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THE
ONTARIO REPORTS,

VOLUME III.,

CONTAINING

REPORTS OF CASES DECIDED IN THE QUEEN'S
BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO,

WITH A TABLE OF THE NAMES OF CASES ARGUED,

A TABLE OF THE NAMES OF CASES CITED,

AND A DIGEST OF THE PRINCIPAL MATTERS.

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BARRISTERS-AT-LAW.

TORONTO:

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OF THE
HIGH COURT OF JUSTICE,

DURING THE PERIOD OF THESE REPORTS.

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ERRATA.

- At page 184, line 7 from the top of the page, for "March 22nd, 1882," read "September 28th, 1882."
- At page 193, line 13 from the top of the page, for "application for them, what," read "application, for there what."
- At page 204, line 3 from the bottom, for "G. H. Galbraith," read "John K. Galbraith."
- At page 347, for "Act" in line 10 of the headnote, read "act."
- At page 365, for "entertained" in line 19 from the top of the page, read "ascertained."
- At page 370, in line 2 of the headnote, for "sues," read "sue."
- At page 511, in line 9 of the headnote, for "necessary," read "not necessary."
- At page 428, in line 5 of the headnote, for "December 20th, 1874," read "September 21st, 1874;" and in line 6 of the headnote for "C," read "G."
- At page 429, in line 14 from the bottom, for "December 21st, 1874," read "September 21st, 1874."

REPORTS OF CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[QUEEN'S BENCH DIVISION.]

WHIMSELL V. GIFFARD ET AL.

Distress for rent—Seizure—Chattel Mortgage—Waiver by tenant of formalities.

The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant C. G. The landlord on the 17th February, 1883, went to the house of the tenant, and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent, and to let no one take anything away, when she promised to do her best for him. On 5th March the plaintiff, hearing that the goods were going to be seized for rent, took possession under his mortgage and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and on the tenants waiving an inventory, advertising, &c., sold them within two days to a nephew of the landlord.

Held, that the landlord's two visits of 17th and 24th February did not amount to a distress.

Quare, whether a tenant can waive all statutable formalities as to inventory, &c., as regards the mortgagee.

The chattel mortgage contained no re-demise clause, but did contain a clause that the mortgagee might take the goods if the mortgagor attempted to sell, dispose of, or part with the possession of the goods.

Held, that the mortgagee had the right, under the circumstances, to take the goods, although default in payment had not been made.

ACTION for damages for the seizure and conversion of certain horses belonging to the plaintiff by defendants.

Defence, that one Francis Giffard was tenant of defendant Charles Giffard and Mary his wife: that rent was in arrear: that defendant Charles Giffard, for himself and wife, distrained on these horses then being upon the lands and liable to distress, and impounded them on the premises, by consent of Francis the tenant: that subsequently the plaintiff rescued the goods, and removed them from the premises, whereupon the defendant Charles Giffard, and the other defendant, by his order, re-took the said goods, *quae sunt eadem*, &c.

Issue.

The case was tried at Cobourg before Wilson, C. J., and a jury.

It appeared that Francis Giffard was tenant under his father and mother, and that a large amount of rent was in arrear, some \$1100, for over two years, and due 1st October, 1882.

The tenant appeared to have been a very dissipated man, and generally under the influence of liquor. On February 17th, 1883, the father went to the house on the farm, and he said he told the tenant and his wife that he seized everything for rent: he touched nothing, no one was with him, no amount was mentioned, they made no objection, and he went away. Again, on the 24th February, he went again. He said to the tenant's wife, the tenant not being in the room, but in the house; "You are aware all this property has been seized for rent by me on behalf of my wife, and I put you in charge of everything here, and no one on any account whatever takes anything off the premises." She said she would do her best to look after the things for him; the horses were then on the premises. He touched nothing, removed nothing, and no inventory was made. The tenant continued using all the property as before.

The plaintiff was a farm labourer for the tenant, who owed him, as he said, over \$200 for work. He had recovered a judgment for about \$90 in the Division Court for work done in the year 1881, and also claimed for work in 1882.

On the 21st February, three days before this alleged distress of the 24th, the tenant executed a chattel mortgage to plaintiff of these horses in consideration of \$237, which the plaintiff allowed was his actual claim, with a proviso for redemption on payment of that sum, with interest, on 1st November, 1883, the mortgagor warranting thereby the said chattels to the mortgagee.

There was no redemise clause or agreement for possession by the mortgagor till default. There was a covenant for payment, and that in case of default, or if the mortgagee should attempt to sell or dispose of or part with the possession of the goods, or remove them out of the county, or suffer them to be taken in execution without the mortgagee's consent, the latter might enter into any lands, &c., where the goods might be and take possession and remove them, and after such taking of possession might sell the same : that the mortgagee need not sell, but in case of default might peaceably have possession and enjoy the same without molestation, &c., of the mortgagor ; and the mortgagor thereby put the mortgagee in full possession of said goods by delivering to him this instrument in the name of said goods.

On 5th March the plaintiff, hearing that the landlord was about seizing for rent, went and took away the horses from the tenant's farm, and put them in a stable of one Ash, some distance from the farm. He denied that any one forbade his taking them, but the tenant's wife said she forbade him, and she then went and informed the landlord. She said that she told plaintiff he must not take the horses, that she was put in charge of them by the landlord for his rent, that he owned every thing, and the plaintiff should not have them; but plaintiff persisted in taking them.

The tenant swore that when the plaintiff and Orr came for the horses he told them they had better see his father before they took them. Orr said it was all right, they would see the old man. "I said, if you see him it is all right, you can take the horses." He said he did not know his father had any claim to the horses. He said

he knew his wife had been put in charge of everything, but he did know that he could stop a constable like Orr: that as they were going away he heard his wife forbidding them taking the horses.

It appeared that the tax collector had issued a warrant for taxes due by the tenant, and delivered it for execution to defendant Richardson, who had gone to the place on the 5th March to distrain after plaintiff had taken the horses away. It seemed that he distrained on other property for the taxes. He afterwards saw the landlord, who told him about the horses and gave him this warrant :

“To WM. RICHARDSON, my Bailiff :

“Distrain the goods and chattels of Francis S. Giffard, the tenant on the farm he now dwells on, or upon the premises in his possession situate, &c., for the sum of \$1,100, being the amount of rent due to us on the 1st day of October, 1882, and for your so doing this shall be your sufficient warrant and authority.

“Dated the 5th day of March, A.D. 1883.

(Signed)

“CHARLES GIFFARD,

“MARY ANN GIFFARD.”

On the 6th March the three defendants went to Ash's stable, broke open the door, and seized the three horses, and drove them to the tenant's premises.

An inventory was produced, signed by defendant Richardson, setting out all the goods as distrained by him for rent on 5th March, including the three horses.

At the foot was written :

“March 8. Sold the above goods and chattels to Robert Giffard for \$1,212.

“J. RICHARDSON, *Bailiff*.”

A memorandum also signed by him stated the property as sold for \$1,212.

Rent	\$1,100 00
Taxes	35 00
Costs on Rent, 5 per cent. . .	55 00
“ on Taxes	3 00
Cost man in possession	3 00

\$1,196 00

There was also a memorandum, dated 6th March, signed by the tenant, waiving his right to an inventory, and excusing advertising the same before sale, and consenting to the sale being made at any time and in such way as to the landlord might seem best, and waiving appraisalment.

At the sale, on 8th March, the whole property was bought by defendant Robert Giffard, a young man, and nephew of the landlord, lately arrived from England, and not engaged in any business. He gave the landlord his cheque for the amount of the sale, which the landlord said at the trial, on 10th April, he had never presented, and still held. The property all remained as before in the tenant's possession.

The learned Chief Justice told the jury that there was no legal distress on the 24th February, so as to make these horses previously mortgaged to the plaintiff liable, and that the plaintiff had the right under his mortgage to take the property.

The jury found in favour of the plaintiff.

May 25, 1883, *M. Phillips* moved to enter a verdict for the defendants, or to reduce the same, or for a new trial.

Hector Cameron, Q. C., contended (1) that Frank Giffard, when he executed the chattel mortgage, was in such a state of intoxication that he did not know what he was doing; that he had no contracting mind, and consequently the mortgage was bad, and the plaintiff could not seize under it. (2) That even if the chattel mortgage was good, it did not become payable until 1st November, 1883, and that in the meantime, and until default in payment, plaintiff had no right to the possession of the goods: *Bingham v. Betinson*, 30 C. P. 438.

(3) That the distresses of the 17th and 24th of February, 1883, were good and valid distresses in law as against the plaintiff: that it was not necessary, in order to constitute a distress, that the party making it should actually lay hold of some article, and say, "I seize this in the name of all the rest," but the mere saying by the landlord, "I seize all the stuff in and around the premises,"

without actually laying hold of anything, was a good seizure: *Wood v. Nunn*, 5 Bing. 10; *Hutchins v. Scott*, 2 M. & W. 809; *Swan v. Falmouth*, 8 B. & C. 456; *Hartley v. Moxam*, 3 Q. B. 701; *Smith L. & T.*, 2nd ed., 224-239; *Castleman v. Hicks*, 1 C. & M. 266; *Thomas v. Harris*, 1 M. & G. 695.

(4) That it was not necessary that the landlord should have the chattels appraised, valued, an inventory taken, and advertized for sale, when the tenant did not object to the irregular proceedings: that the statute was only intended to protect the tenant as against the landlord, and that the plaintiff could not question the validity of the proceedings.

J. W. Kerr, contra, contended that Mary Giffard could not act as a plaintiff, because she was a married woman, and that plaintiff was not liable to Frank Giffard.

June 30, 1883. HAGARTY, C. J.—I am of opinion that the direction was right.

The alleged distress was on 24th February.

The landlord takes no further proceedings for nine or ten days—no inventory, no appraisalment or notice of sale. If he can leave the property thus for ten days, he may apparently do so for any further time.

Any irregularity may, of course, be waived by the tenant, but when it is asked to hold the goods of third persons bound for any unlimited time by such a course of proceeding, I think there is no authority to warrant it.

The furthest the Courts seem to have gone in upholding a distress may be seen in the cases.

Wood v. Nunn, 5 Bing. 10. Trover for a lathe. The lathe was in Saunders's house. He owed rent to defendant. About six or seven, A. M., the landlord went to the house and found the plaintiff and Saunders disputing about the lathe, plaintiff trying to remove it as his property, Saunders strongly objecting. Defendant laid his hands on it, saying he would not suffer it or any of the things to go till his rent was paid. Plaintiff, however, carried it off. Defendant, about noon on the same day,

made a formal distress of the goods in Saunders's shop, and caused the lathe to be retaken and brought back to the shop.

The Court held that there was no collusion between landlord and tenant. Best, C. J.: "The distress commenced when the landlord came on the premises and said: 'This shall not go till my rent is paid.' From that time the property was in the custody of the law; and being improperly removed, the landlord had a right to get it back."

This case is followed in *Cramer v. Mott*, L. R. 5 Q. B. 357. Trover for a piano. One Wynne occupied rooms in defendant's house. Rent was in arrear. He had hired a piano from plaintiffs. They sent to get it back. Defendant's wife told the persons sent that it could not go till the rent was paid. Tenant said it must go. She insisted, and said it should not go, and plaintiffs went away. They came again three days after. She again refused to let it go, and they again left. Her husband, the defendant, knew and approved of what she had done, and the next day the piano was formally distrained on.

The Court unanimously upheld a verdict for defendant.

Cockburn, C. J.: "The case is therefore substantially on all fours with *Wood v. Nunn*, which I think was well decided. I think there need not be an actual seizure to create a distress: it is enough that the landlord or his agent takes effectual means to prevent the removal of the articles from off the premises, on the ground of rent being in arrear, and he does this when he declares that the article shall not be removed till the rent is paid."

Blackburn, J., says: "I think both on principle and authority the refusal to allow an article to leave the premises unless the rent in arrear be paid, amounts to a distress."

Hannen, J.: "It is not necessary to say whether it will not be a distress by mere words only, but only whether it will not be a distress if the words are capable of being carried into action. Here the defendant's wife had power instantly to have physically prevented the removal of the

piano had the plaintiff's men persisted in removing it, and the jury found that she acted *bonâ fide* and intended to detain the piano for rent."

In *Swann v. Lord Falmouth*, 8 B. & C. 456, it was held that a distress was sufficiently shewn on the evidence to enable the plaintiff, the tenant, to sue his landlord for excessive distress. Littledale, J., agreeing that what was done was sufficient for that action, says: "The case might have been different had the question arisen between the landlord and an execution creditor, or a purchaser for valuable consideration without notice, for the landlord might perhaps be considered to have lost his right as against third persons."

Roe v. Roper, 23 C. P. 76, is in point. On the 19th September a bailiff seized and left the property on the premises, without putting any one in charge except that the tenant himself was to take possession for the plaintiff under the warrant. No further proceedings were taken by the bailiff, and on 24th October, (thirty-five days after) the defendant, who had a chattel mortgage on these goods from the tenant, took possession of them and removed them.

The jury found that the bailiff, after the seizure, did not take any steps to further execute the warrant, and that the tenant was constituted plaintiff's agent to take possession of the goods for plaintiff under the warrant.

On this the verdict was entered for defendant in the County Court, and on appeal the Common Pleas dismissed the appeal, on the ground that it clearly appeared that when the defendant (the mortgagee) seized the goods were in no way in the custody of the law, and the jury found very properly that the bailiff did not take any steps to execute the warrant after seizure.

In the present case I think the learned Chief Justice held rightly that defendants could not rely on the distress of February 24th, and that, with no further steps being taken for nine or ten days, the goods could not be considered in the custody of the law.

There being no dispute about the facts, and the case

being taken as on the defendants' own evidence, there was nothing on that point to leave to the jury.

No point whatever was made or suggested on what took place on the tenant's wife's evidence when the plaintiff and Orr took away the horses, as being the inception of a distress within some of the expressions in *Cramer v. Mott*, nor was the learned Judge asked to leave anything thereon to the jury, nor was the defence in any way framed to bring it within the law or the circumstances of that case.

It was then objected that under his mortgage the plaintiff had no right to take away the horses before default.

The learned Chief Justice held that he had, notwithstanding the judgment in his Court in *Bingham v. Bettinson*, 30 C. P. 438.

I agree in his decision in this case. In any view of the law on this point between mortgagor and mortgagee, I do not see how it arises in the present case, where the defendants sold the mortgaged property, thus preventing the mortgagee availing himself of it if default should be made.

It was then urged as a defence that the plaintiff's mortgage was void, as Giffard, the mortgagor, was so drunk when he executed it that he did not know what he was doing. Evidence was taken on this point on both sides. It was left to the jury and they found against the defendants, and I can see no reason, on reading the evidence, to question the correctness of the finding.

It was then objected, with a view to the damages, that the sum mentioned in the mortgage, \$237, was not really due to the plaintiff, but only \$90. This was very fully enquired into, and the jury found the larger sum was due, and I think we cannot interfere.

Even if the defendants had succeeded in proving that a valid distress was made on the 24th of February, and that the mortgaged property was bound thereby, I think some grave objections would remain to be discussed as to the landlord's proceedings. When the property of another person is seized under the large powers of the

landlord, the latter should proceed with some regularity. It is not easy to see what right the tenant can have to waive all statutable formalities as to inventory, appraisal, sale, &c., in two days as regards the property of another. It might also in such a case have been necessary to take the jury's opinion as to the validity and reality of the alleged sale *en bloc*, and the purchase by the nephew, and the unrepresented cheque from him lying over a month in the landlord's possession, and the tenant left just before in the possession of everything, in fact nothing changed or done except the payment of \$35 taxes, and the destruction of the plaintiff's mortgage security.

ARMOUR, and CAMERON, JJ., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

SKELTON ET UX. V. THOMPSON ET AL.

*Discharging water from building upon street—Formation of ice thereon—
Negligence—Liability of proprietor.*

The defendants were the owners of a building on the street. A pipe, connected with the eave troughs, conducted the water from the roof down the side of the building, and by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street, and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known of it.

Held, ARMOUR, J., dissenting, that the defendants were not liable.

Per HAGARTY, C. J. The carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident, and the defendants not having knowingly allowed ice to accumulate were not responsible.

Per ARMOUR, J. The conducting of the water to the sidewalk was a wrongful act, of which the formation of ice on the sidewalk in winter was the natural certain and well known result, and defendants were responsible for the accident.

THE statement of claim alleged that defendants occupied premises on the corner of King and Francis streets, in the city of Toronto, and that there was a pipe attached thereto which collected and threw the water from the roof upon the sidewalk on Francis street: that in June last the water was so collected and poured down upon the sidewalk, and by defendants' default and neglect was allowed there to remain and freeze, and being so frozen formed an obstruction to the proper and safe use of the sidewalk: that on the evening of that day the female plaintiff was passing, slipped, fell, and was injured: that there was no light, &c., to mark the obstruction, &c.

Statement of defence, denying all negligence, and that there was no obstruction on the sidewalk: that defendants were obliged to remove; with a charge of contributory negligence.

The case was tried at the last Winter Assizes, at Toronto, before Osler, J., and a jury.

It appeared that defendants' premises were on King

street and Francis street, and that for thirty or forty years there had been a spout down the side of the building in Francis street, carrying away the water from the roof. Where it touched the inside of a four-foot sidewalk there was a cup and kind of channel cut across the sidewalk leading the water into the drain.

It was sworn that this channel was cut by the corporation when laying down new planks. It also appeared that in most of the old buildings in the city this was the manner in which the water ran from the spouts over the sidewalk.

Four or five years ago the corporation passed a by-law directing that in the case of all buildings thereafter erected the spouts should drain under the sidewalk. There was also a by-law of the city to compel persons to keep the sidewalk free from obstructions caused by dirt, snow, ice, &c., before 9 a.m. every day in the winter time, and obliging persons at all times to keep the sidewalks, &c., clean, and free from obstruction or incumbrance.

On the evening of the 18th January, between five and six p.m., when it was nearly dark, the plaintiff's wife was passing, slipped and injured herself. She and her witnesses stated that there was an accumulation of ice, a ridge of ice from the cup at the foot of the spout, extending more or less across the sidewalk, and that it was several inches high, the weight of testimony seeming to shew that the ice extended fully half-way across the sidewalk.

On the defence it was shewn that the day had been mild and thawing until the afternoon, when it began to freeze: that at two o'clock there was no ice visible, and at four o'clock one of plaintiff's brothers said he did not notice any. The defendants' porter said it was his business to clear away any ice formed, and that he did so on that morning, and at two p.m. it was perfectly clear: that at six p.m. he closed up, carrying the heavy shutters across that part and there was nothing to cause him to slip: that then there were about three inches on the outer side of the cup in the sidewalk: that he was in the habit of clearing away

ice whenever he saw it there: that he sometimes put ashes over the sidewalk, but that on this evening he saw no necessity for so doing.

The learned Judge was of opinion that it was not unlawful for defendants to have the spout bringing down the water from the roof as it was done, as they had the sanction of the corporation for so doing.

The jury were asked to find whether the defendants had reasonable time in which to become aware of the condition of the sidewalk before the accident. The jury on this found that the defendants did not know, and ought not reasonably to have known, the condition of the sidewalk. The verdict was found in favour of the defendants accordingly.

February 7, 1883. *Bigelow* moved to set aside the verdict, and contended that the defendants had no right to place the down pipe on their premises in such a position as to throw the water on the highway, and that having done so they would be responsible for any injury that might arise.

Tilt, contra. The down pipe having been there for thirty-five years by the consent of the corporation and public, it cannot be said that it was wrongfully there, and plaintiffs were estopped from saying the pipe was wrongfully there: *Dillon on Corporations*, 2nd ed., vol. 2, sec. 533. The jury found there was no negligence on the part of the defendants. There is no liability as between adjoining proprietors and the public to keep the sidewalk clear. Under the Municipal Act R. S. O. ch. 174 the duty is cast on the corporation, and the proprietors are only fined. See secs. 489, 491, and 466, *Harr. Municipal Act*. The damages are too remote. The accident was not the natural or ordinary consequence of the defendants having the pipe there; it was not the proximate cause. If it had not been for the frequency of the water the accident would not have happened. The evidence shews contributory negligence. He cited *Sharp v. Powell*, L. R. 7 C. P. 253; *Shepherd v. Midland R. W. Co.*, 25 L. T. N. S. 879.

June 30, 1883. HAGARTY, C.J.—It seems to me unnecessary to discuss the point whether it was or was not lawful to have the spout in use as it was. No injury was caused to the plaintiff by this spout, or by the mere fact of its discharging water on the sidewalk.

It seems impossible to put the plaintiffs' case in a more favourable view than this, that by the defendants' act or neglect an obstruction was caused on the sidewalk in the shape of an accumulation of ice.

We may concede to plaintiffs, for the argument, that if ice forms on the sidewalk from the freezing of water in any way flowing or coming from the defendants' premises so as to form an obstruction thereon, they are bound with reasonable promptitude to remove it. It is not the flow of water, it is the action of the weather thereon, expected or unexpected, that makes the obstruction.

In *Shipley v. Fifty Associates*, 101 Mass. 251, (1869,) the head note is, "For an injury resulting from the sliding of a mass of ice and snow from a roof upon a person travelling with due care upon a highway, the owner of the building is liable if he suffered the ice and snow to remain there for an unusual time after he had notice of its accumulation and ought to have removed it."

Chapman, C. J., discusses the law, and so holds, recognizing the principle laid down in *Fletcher v. Rylands*, L. R. 3 H. L. 330.

This seems reasonable enough. When the owner knows that ice or snow is accumulated on a sloping roof, liable of course, at any change of atmosphere or otherwise, to fall into the public street, he may properly be held responsible, if in reasonable time he do not take steps to prevent injury to passers by.

The case before us is widely different. The defendants knowingly allowed no accumulation of ice on the sidewalk, and the jury find that they ought not reasonably to have known of any such. I therefore am unable to see any legal liability that they have incurred.

The corporation are primarily responsible for the state

of the highway. They have the power to compel property holders to remove snow, for example, from the sidewalk in front of them, under pain of fine, &c. This snow does not encumber the sidewalk from any act of the property owner or occupant.

Injury to a passer by from non-compliance with the by-law could hardly, I think, be recoverable from the owner or occupant neglecting to obey the by-law, but it is unnecessary here to decide any such point.

The occupant may be liable at common law for injury caused by an obstruction that *he* places or puts on the highway; but in this case he knowingly puts no obstruction. He is bound by municipal law by a named hour in the morning to remove snow and ice from the sidewalk. A sudden fall in the temperature occurring during the night may stop the flow of water, otherwise quite harmless, and convert it into ice. I cannot hold that he is bound at all times and at all hazards to watch that ice so formed be instantly removed.

The jury in substance find that he was not guilty of any neglect or unreasonable delay in removing the ice so formed.

I think the evidence fully warranted such finding, and absolves the defendants.

I have viewed the case in the light most favourable to the plaintiffs, assuming a liability on defendants' part to remove any ice so formed in a reasonable time, treating the ice, in effect, as an obstruction which might under certain atmospheric conditions arise from water brought by them upon the sidewalk.

I must not be understood as accepting the plaintiffs' view of the law as correctly defining defendants' liabilities. I accept the finding of the jury as disposing of the only possible ground on which I think the plaintiffs could hope to base their claim.

Had the finding been otherwise, it would have opened a wider range of enquiry.

Such a case as *Sharpe v. Powell*, L. R. 7 C. P. 253, as to

the distinction in cases of injury between the *causa causans* and the *causa sine qua non* is considered. I think the defendants are entitled to judgment.

ARMOUR, J.—The facts of this case are extremely clear, and the liability of the defendants for the injury which the female plaintiff sustained is to my mind equally clear.

The defendants were the owners of a brick building situate on the corner on the east side of Francis street, and on the north side of King street, in the city of Toronto. The westerly wall of this building was placed on the very limit of the east side of Francis street. A pipe was attached to the outside of the westerly wall of the said building, extending from the eavetrough of the building to within a few inches of the sidewalk, which pipe terminated in a spout a few inches in length, extending over the sidewalk. The pipe and spout were so placed for the purpose of conducting the water from the roof to the sidewalk, whence it ran over the sidewalk to the gutter. The pipe and spout were wholly on the street, and had been placed there some thirty or thirty-five years ago, and had remained there ever since, and the water had during all that time been conducted from the roof on to the sidewalk by means of this pipe and spout. In the winter seasons the water so conducted on to the sidewalk was constantly forming ice upon the sidewalk, and this was well known to the defendants. The female plaintiff, walking along this sidewalk, on the evening of the 18th of January, and not seeing a mound of ice formed by this means and in this way upon the sidewalk, stepped upon it, and slipping fell and was injured.

This pipe and spout were wrongfully upon the street and were kept there wrongfully by the defendants, and the conducting the water from the roof of their building on to the street was a wrongful act on their part, and the ice formed thereby being the natural, certain, and to them well known result of their wrongful acts, they were just as much responsible for the obstruction so formed as they

would have been if they had carted ice from the bay and placed it there.

These defendants would have been, in my opinion, indictable for these wrongful acts as a nuisance to the public, and what has been set up as an attempted answer to this action would not have been any answer in law to such an indictment. No evidence was given at the trial to show that the city had ever given any authority for the erection of this pipe and spout, as was suggested at the trial might have been the case, nor was there any evidence given from which any such authority could have been inferred, nor was it legally in the power of the city to have given such authority; but as far as the evidence at the trial went such erection was clearly wrongful and unlawful, and no length of time will legalize a nuisance.

In my opinion the order *nisi* should be absolute to enter a verdict for the plaintiffs for the amount assessed by the jury.

CAMERON, J agreed with HAGARTY, C. J.

Order nisi absolute.

[QUEEN'S BENCH DIVISION.]

GOODMAN ET AL V. REGINA.

Gambling—Summary trial—Substitution of different offence at trial—Consent to trial on substituted offence—Sentence.

The plaintiffs in error were charged with having defrauded one C. by a game called three card monte. They consented to be summarily tried. When brought up for trial the Crown Attorney asked for and obtained leave to substitute a charge of combining to obtain money by false pretences, the prisoners objecting. The trial proceeded without the consent of the prisoners obtained to be tried summarily for this offence. They were convicted and sentenced to one year's imprisonment.

Held, on error, that their consent to be summarily tried on the substituted charge should appear, and that in its absence the conviction was bad.

Held, also that it was bad in adjudging the sentence of one year, the Act, 40 Vict. ch. 32 D., only authorizing a sentence for any term less than a year.

ERROR from a conviction of the Judge of the County Court of the county of Welland.

It appeared from the return to the writ of error that the prisoners were charged in the information with having, in a railway carriage, by means of a game called three-card monte, obtained from one Carpenter \$20 : that, brought before the learned Judge of the county of Welland, on December 28th., they were asked if they consented to be tried without a jury, and they so consented : that on the 4th January they were brought before the Judge for trial, and declared themselves ready for trial : that the County Attorney then applied to the Judge to be allowed to substitute for the charge another charge, to the effect that they combined, &c., by false pretences, &c., to obtain money from Carpenter and to cheat and defraud him thereof, and in pursuance thereof did fraudulently obtain \$20 from him : and also that they, with intent to defraud, did take and obtain by false pretences \$20 from Carpenter, and did thereby, with intent to defraud, appropriate the same to their own use, &c., &c. : that the learned Judge consented to such substitution, the defendants by their counsel objecting thereto : that they were thereupon arraigned on said substituted charge, and pleaded not guilty : and

that the Judge tried the case and convicted the prisoners, sentencing them to one year's imprisonment.

The errors assigned were, in effect, that the prisoners only elected and assented to be tried on the charge read to them from the information, and not on the substituted charges ; and that the Act 40 Vic. ch. 32, D., on which they were committed for trial, only authorized a sentence for any term less than one year, while the sentence passed upon them was for one year, and was therefore illegal.

June 9, 1883.—*McGregor*, for the plaintiff in error. Under the Speedy Trials Act, 32-33 Vic. ch. 35, D. under which these prisoners were tried, it was necessary for the prisoners to be twice brought before the Judge who was to try them ; the first time under section 3, sub-section 3, to ascertain, after the charge had been stated to them by the Judge, as required by sub-section 1, if they would consent to be tried by the Judge without the intervention of a jury. The consent here to be given was intended by the statute to be a mere formal one, and was to be given only for the purpose of letting the Judge know whether he was to hand the papers to the County Attorney or Clerk of the Peace to draw up a formal record for the purpose, as provided by section 4, of having the prisoner arraigned for trial by the Judge. The consent to give the Judge jurisdiction must be given after arraignment, and should be entered at the foot of the indictment or accusation, as is provided in the printed form returned, which was afterwards amended. This consent must appear of record, as provided by section 1 of the Act. Now in this case this was not done, and no consent after arraignment appears of record ; in fact the very contrary appears by the record produced, for it is shewn that on the first appearance before the Judge the charge stated in the sheriff's notice, a charge for gambling on the train, was read over to the prisoners, who elected to be tried by the Judge on that charge only. This consent appears of record, after which an application was made by the County Attorney to substitute other

charges under 42 Vict. ch. 44, sec. 3, which was granted, and upon arraignment on these charges no consent to jurisdiction was ever given. The first charge should have been disposed of before proceeding with the substituted charges. The term of imprisonment is for a longer period than prescribed by the Act under which they were committed for trial, the prisoners being sentenced for one year, the Act providing a sentence of imprisonment for a term less than one year.

Irving, Q.C., for the Crown. The consent given to try the prisoners was not given on any particular charge, but was given to be tried on any charge which could be formulated on the depositions. The statute enacting that "*the Judge, after having obtained the depositions, shall state to the accused the offence with which he is charged,*" of course means from the depositions. The charges upon which the conviction was made are only another form of setting out the crime on which the plaintiffs in error were committed for trial. The Judges have power by statute to amend the record on a writ of error.

June 30, 1883. HAGARTY, C. J.—When the prisoners were first brought before the Judge the charge against them was read, and they formally assented to be tried by the Judge. This charge was framed for obtaining money by means of a game called three-card monte. They assented to be so tried, probably in the full belief that such a charge could not be proved. Then, when they appear on a future day for trial, the learned Judge, the prisoners objecting, allows the charge to be in effect turned into two charges in substance amounting to obtaining money on false pretences, and the indictment is so drawn.

The 4th section of the Act, 40 Vict. ch. 32, D, declares that "any money or valuable thing obtained by an offence against the first section of this Act shall be dealt with as obtained by larceny from the person, and this Act shall be interpreted as one Act with the 'Act respecting larceny and other similar offences.'"

Section 93 of 32-33 Vic., ch. 21, applies to false pretences, for which imprisonment up to three years is allowed.

We think it clear that where a man consents to waive his right to a jury, and to be tried summarily by the Judge on a charge which on its face would only warrant an imprisonment less than a year, he ought not by any implication to be held as assenting to waive such right as to any charge that the law may allow to be substituted therefor which might render him liable to a larger punishment, and that his assent to be summarily tried on the substituted charge should be obtained and recorded.

The prosecution here did not apparently adopt the provisions of section 4, already cited, and treat the charge as one of larceny, but as in the nature of false pretences.

The Act 32-33 Vict. ch. 35, 1869, section 3, directs how the Judge shall proceed, informing the prisoner of the charge, and describing it. He may then assent to being tried. Schedule A. gives the form which the County Attorney shall draw up. It sets out the charge and the consent to be tried. He is then to be arraigned on the charge and pleads.

In 1879 this Act is amended by 42 Vict. ch. 44, sec. 3, which directs that the County Attorney may, with the consent of the Judge, prefer a charge or charges for any offence or offences for which he may be tried at the general sessions, other than the charges for which he has been committed for trial, although such charges do not appear or are not mentioned in the depositions on which he was committed.

We think it clear that in such a case of substitution as is here allowed the prisoner's consent should be distinctly obtained, not to the substitution, but to the waiving of the right of trial by jury.

There ought to be no misunderstanding in such a matter. A prisoner, not represented by counsel, might be very seriously prejudiced by assuming that his consent to give jurisdiction to try him on one specific charge impliedly enabled the Judge to try him on one assuming a different

shape, and, as here, apparently involving a more severe penalty.

If this charge is confined to the Act of 1877 against gambling, (40 Vic. ch. 82, D., and as falling within the first section, and as amounting, as therein stated, to an obtaining of money by false pretences, the sentence cannot be supported as being for a whole year.

We are of opinion that it should appear that the prisoners assented to be thus tried without a jury on the substituted charge, and also that the sentence appears to be in excess of the penalty allowed by the statute.

If sought to be supported as on the false pretences section in the 32-33 Vic., ch. 21, allowing a sentence up to three years, it would be still more necessary to show an assent to this mode of trial.

We think the plaintiffs in error are entitled to judgment, and that the conviction must be quashed.

CAMERON, J., concurred.

ARMOUR, J., took no part in the judgment, not having been present at the argument.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

THE CORPORATION OF THE COUNTY OF BRUCE V. MCLAY.

Registrar—Dismissal during year—Return to municipality—Liability for excess of fees.

The defendant was registrar of the county of Bruce, and during the year 1882 was discharged from office. The plaintiffs brought this action for the recovery of the proportion of the amount of fees received by him up to the time of his dismissal in excess of the amount allowed to be retained by him pursuant to R. S. O. ch. 111, sec. 104.

Held, affirming the judgment of GALT, J., that the dismissal of the defendant during the year did not deprive the plaintiffs of their right to recover the excess, which right did not depend upon the return to be made in each year.

THIS was an action tried before Galt, J., without a jury, at the last Assizes at Walkerton, whereat the learned Judge directed judgment to be entered for the plaintiffs for the sum of \$1,747.64, being the amount received by the defendant as registrar of the county of Bruce for fees in the year 1882, in excess of the amount retainable by him as such registrar, under section 104 of ch. 111, R. S. O.

The defendant objected to the plaintiffs' right to recover on the ground that no notice of action had been served upon him one month before action brought: that he had executed the covenant with two sufficient sureties required to be given by the said Act for the performance of his duties as registrar, and that until the remedy against him on such covenant was exhausted he was not liable for the alleged excess: that he was dismissed from his office before the expiration of the year 1882, and therefore did not make and could not make the return of fees required to be made under section 97 of the same Act.

The learned Judge overruled these objections, and directed judgment to be entered for the plaintiffs as above.

May 31, 1883. *Robinson*, Q. C., for the defendant, moved, pursuant to notice of motion, to set aside this judgment, and to enter judgment for the defendant. The question is can the County recover the money under the

Act? Under the Act no right of action arises because he was dismissed before he was obliged to make the return, which he could not make in consequence of his dismissal. He referred to *Hardcastle* on Statutes, p. 20-222; *Wilberforce* on Statutes, 24, and the sections of the Act referred to in the judgment; also to *Ross v. McLay*, 40 U. C. R. 83.

Ross, contra. A registrar has two duties: (1.) To make a return; (2.) To pay over moneys which he has no right to retain. These are distinct duties.

As to notice of action, he referred to *Ross v. McLay*, *supra*; *Harrison v. Brega*, 20 U. C. R. 324.

June 30, 1883. CAMERON, J.—We think the judgment ought not to be disturbed. It is not open to any of the grounds of objection taken at the trial. The covenants of the defendant given under the Act do not in any way interfere with the right of any party aggrieved to maintain an action against him for any neglect of his duty. The objection that he was not served with notice of action, is equally untenable. He is sued for not paying over money which under the Act he was bound to pay to the plaintiffs, not for doing some act which has occasioned an injury to the plaintiff, that he was required to do in the performance of his duty, and so is not within the protection of secs. 1 & 20 of ch. 73 R. S. O.; *Ross v. McLay*, 40 U. C. R. 83; *McLeish v. Howard*, 3 App. 503.

The objection most strongly pressed upon the Court by Mr. Robinson on the argument was the dismissal of the defendant from office before the time for making the return of his fees under secs. 97 & 104, of ch. 111, and that until such return was made the fees had not been ascertained in the manner essential to entitle the plaintiffs to recover any portion thereof. He contended that under sec. 92 the fees were payable to the registrar for himself, and it was only in the event of his being allowed to serve the full year, that is, up to the 31st December, 1882, it could be ascertained what amount he would be actually entitled to; and the amount received up to the time of dismissal, though greater than

the amount he was then entitled to retain, might not be greater than his portion if the fees would have been under his management up to the end of the year. This argument is not entitled to prevail.

The language of section 104, under which the plaintiffs' claim arises, is as follows: "On the 15th day of January in each year each Registrar shall transmit to the treasurer of the county or city for which, or for a riding of which he is registrar, a duplicate of the return required by this Act, and shall also pay to such treasurer for the uses of the municipality such proportion of the fees and emoluments received by him during the preceding year, as under this Act he is not entitled to retain for his own use."

The amount claimed by the plaintiffs is the amount received by the defendant up to the time of his removal in excess of what he had a right to retain for himself. By section 98 it is provided that "each Registrar shall be entitled to retain to his own use in each year all the fees and emoluments received by him in that year up to \$2,500;" and by sections 99 to 103 he is entitled to a graduated percentage on the amount received in excess of \$2,500. It would seem then clear if a Registrar received previous to his removal from office in any year more than \$2,500, the county or city is entitled to receive a proportion of the excess in accordance with the rate fixed by the clauses mentioned, and it is a matter of no consequence whether the Registrar is continued in office or not till he makes the return required by section 97, and the duplicate return required by section 104. The right of the municipality does not depend in any manner upon the return. It would not bind it as to the amount alleged therein to be received, which could or might be shewn quite irrespective of such return, and the plaintiffs, if a return had been made, would be at liberty to dispute its correctness. The motion must therefore be dismissed.

HAGARTY, C.J., and ARMOUR, J., concurred.

Motion dismissed.

[QUEEN'S BENCH DIVISION.]

JOHNSTON V. OLIVER ET AL.

Limitation of actions—Possession of doweress.

C. R. died intestate in 1864, seised in fee simple of the land in question, leaving his widow and several heirs-at-law. The widow remained in possession from the time of his death until her own decease in 1881, and cultivated the farm. There was some evidence of her declarations that she kept possession with the consent of the heirs for them, claiming only her dower, but no evidence of a written acknowledgment of their title. She devised the land to the plaintiff.

Held, that the possession of the widow was not a possession *qua doweress* even of one-third of the land, and that the title of the heirs at law to the whole had been thereby barred.

PLAINTIFF'S statement of claim alleged that Charles Ross, was seised in fee of the north half of lot 34, in the 9th concession of North Dumfries, and died on 8th April, 1864, intestate and without issue, but leaving his widow Madeline Ross him surviving, who continued in possession of the said land till the time of her death, which took place on the 6th October, 1881, and thereby acquired a title by possession to the said land: that on 19th May, 1874, said Madeline Ross made her will and devised said land to plaintiff in fee: that the defendants, after the death of said Madeline Ross, entered into possession of the said land and refused to give it up to plaintiff; and she claimed possession of the said land and \$200 for mesne profits.

The defendant John Ross's statement of defence alleged that he denied the title of the plaintiff: that he claimed title to the land by length of possession in himself and those under whom he claimed: that he was one of the heirs-at-law of said Charles Ross, and was entitled to possession of said land as tenant in common with the other heirs of said Charles Ross: that said Madeline Ross, who was entitled to dower in said land as the widow of Charles Ross, was after the death of said Charles Ross at her own request permitted to occupy the said land during her life by said John Ross and the other heirs-at-law of said

Charles Ross, as and by way of an assignment of her dower in the same ; and that she always admitted the title of said John Ross and the other heirs-at-law of said Charles Ross to said land, and her possession was not adverse, and she never claimed title to said land or to the possession of the same adversely to said John Ross and the other heirs-at-law of said Charles Ross : that said John Ross and the other heirs-at-law of said Charles Ross, also at the request of said Madeline Ross, allowed and permitted her to occupy and possess said land during her life, and she did so occupy the same as caretaker of the same and as their bailiff for the purpose of paying her dower thereout and preserving the said land for the said heirs-at-law at her decease, and she occupied the same by virtue of such permission only, and not adversely to said John Ross and the other heirs-at-law.

The statement of defence of the defendant Oliver alleged that during the lifetime of said Madeline Ross she leased said land to him for a term determinable by her death, and that he was in possession of said land by virtue of said lease at her death : that after her death he paid the rent payable by him under said lease to one Marshall, executor of the said will of said Madeline Ross, who informed him that the said land belonged to the heirs-at-law of said Charles Ross, and who thereupon procured a lease of said land to be made by the defendant John Ross, one of such heirs-at-law, to him of said land, dated 23rd February, 1882, for a term ending 1st November, 1882, at a rent of \$100, \$50 payable 1st May, 1882, and \$50 payable 1st November, 1882, and by such lease the defendant Oliver covenanted to pay rent, &c. : that plaintiff, a few days before 1st November, when said lease would expire, demanded possession of said land from him, but being liable to be distrained on for rent by said John Ross, and being also liable to him on his covenants, he was compelled to pay the remaining \$50 of rent to said John Ross : that prior to said demand of possession he had no knowledge or notice of the alleged title of plaintiff, and

that if he had had knowledge or notice before he accepted said lease he would not have accepted the same, but would have left said land and not exposed himself to any question between the claimants thereto: that he paid the first instalment of rent to the said John Ross without any knowledge or notice of the claim of plaintiff, and that if he had known a sufficient time beforehand to have protected himself against the said John Ross, he would not have paid any rent to said John Ross, but would have paid the same into Court, or as he might have been directed: that when plaintiff demanded possession he was without advice, and was wholly ignorant of his liabilities other than his liabilities to said Ross under the said lease, and he did not pay said rent to said Ross for the purpose of defeating plaintiff or for any improper purpose, but merely for the reason that he believed Ross would compel him to pay it, which he threatened to do: that he continued in possession of the land after 1st November, and until 1st of January, 1883, because of the illness of a member of his family, and with the concurrence of said Ross, as a caretaker merely, when Ross took possession thereof by placing another tenant therein, when he quitted such possession: that he had no interest in the matters in question; and he submitted that it would be inequitable and unjust that he should be ordered to pay rent or costs.

The cause was tried by and before Osler, J., at the last Spring Assizes at Berlin, when it appeared that Charles Ross died in possession of the land in question, when it did not appear, except that it was about 1864: that he had no children: that his wife, Madeline Ross, survived him, and continued to live on the land till her death on 6th October, 1881: that after her husband's death she continued farming the land herself until she leased it to one Jamieson to hold for five years from 1st April, 1871.

At the expiration of this lease she leased the land to one Linton to hold for five years from 1st April, 1876, and at the expiration of his lease she leased the land to the defendant Oliver to hold for five years from 1st April,

1881. The reservations of rent in those leases were to her, not adding "her heirs or assigns," and the covenants therein were with her, not adding "her heirs and assigns." The plaintiff was taken when a child by Charles Ross and his wife to bring up, and they brought her up, and she lived with them till her marriage, and nine years after her marriage, her husband and Charles Ross having died in the meantime, she and her daughter, at Mrs. Ross's request, came and lived with her and took care of her until her death.

By her will, dated May 19th, 1874, Mrs. Ross, after making several bequests, gave and bequeathed to the plaintiff all the residue of her estate of which she should be seised and possessed, or to which she should be entitled at the time of her decease, and she thereby nominated one Marshall to be her executor of her said will, and he duly obtained probate thereof. Marshall was a neighbour, who drew the said leases for her and also the said will, and generally gave her his advice and assistance in the management of her affairs. Mrs. Ross had taken out letters of administration to the estate of her deceased husband, Marshall becoming one of her sureties, and upon the administration of his estate there was a small sum of money remained for distribution among his next of kin.

At the time of Mrs. Ross's death, and for nearly a year afterwards, Marshall and the plaintiff were not aware of the change of the law, and both thought, as Mrs. Ross had thought in her lifetime, that twenty years was the period of limitation, and the plaintiff thought that upon her death the property passed to the heirs of her husband Charles Ross, and the plaintiff moved off the land, and Marshall told the tenant, the defendant Oliver, that the heirs of Charles Ross had become entitled to the land, that Mrs. Ross's title to it had terminated with her death, and that he had better not do any more work on it, as he would get no pay for it. One James Ross, claiming to be a son of a half brother of Charles Ross, came to the land in June, 1881, and saw the defendant Oliver, and he sent him to Marshall, and Mar-

shall and he went to see Mrs. Ross, but she was unable to enter into conversation with him, and he told Marshall to write to his brother at Inverness if Mrs. Ross should die, informing him of it. On the 8th of December, 1881, Marshall wrote to John Ross, Inverness, Scotland, the following letter: "I received your letter some time ago and have delayed answering, always expecting to hear from your brother James. I wrote to him the same day I wrote you, and requested him to write and let me know if he received my letter, but has never got any word from him yet with regard to your aunt's position. I may say that she had been the most helpless person that you would imagine for the last two years; was unable to move herself from one position to another, and before the last not able to feed herself. As for means to live on she had plenty, and all the attendance she required; the party that attended her was one that your uncle and aunt took when she was about six years old, and brought her up as their own; she got married a few years before your uncle died and went away about sixty miles from here, and about nine years ago her husband died and left her with one little girl and not much means to support them. Your aunt went and brought them home to stay with her, and they were with her as long as she lived, which proved a blessing to both, as they were able to give the old woman all the attendance she required, and, at the same time, the others got a living. The girl is now about seventeen years of age, and was a great help, as the old woman got to be so helpless that one person could scarcely manage, and what she would have done if it had not been for them it is hard to say. With regard to her effects, she made a will some seven years ago, leaving some small amounts to a few relatives, but the most part to the widow that lived with her. The farm is a fairish good place, and contains one hundred acres. It is all free of any encumbrance, and as I was appointed executor in the will of Mrs. Ross I have possession of the deed for the farm, which will be delivered over to the heirs of your late uncle as soon as it is determined who they

are. There seems to be a family of Clarks that think they have a claim, but what foundation they have for thinking so I cannot tell. I had been told by some that the Clarks were half brothers and half sisters to your late uncle Charles Ross, but according to what your brother told me I can't see how they are. I had a letter a few days ago from one Finlay McGillivray, asking for information regarding the matter, so you will have to clear the affair up amongst yourselves. I don't know of anything more that I need write at present. Should I not hear from your brother soon I may write to the person he told me to send his to the care of, in case he might be left the place."

On February 21st, 1882, Marshall wrote to Messrs. Howland, Arnoldi & Ryerson as follows: "I write you a few lines with regard to the Ross estate now in your hands. The party that had the farm last year is willing to keep the place this summer on condition that he can keep it till about the 1st of November, so that he could take off his crops. He will pay \$100 rent, and will pay the taxes, which will be something over \$30, and will keep the place in order, which I think is a very good offer; in fact more than he could pay if it had not been that he had a considerable fall ploughing done last fall before Mrs. Ross died. If you can't sell very soon I think it would be wise to rent, as the place would be of very little benefit to any person buying it for this summer, unless they get it before time for putting in spring crops. Should you rent you would then only sell to give possession at the expiration of the lease. An early answer is desirable, as the party now in possession will be looking for another place. The party's name is James Oliver."

A lease was thereupon entered into, bearing date the 25th day of February, 1882, between Frank Arnoldi, solicitor and agent for John Ross, of the town of Inverness, Scotland, heir-at-law of Charles Ross, and James Oliver, by which the former demised to the latter the said land, to hold to 1st November, 1882, at the rent of \$100, \$50 to be paid on 1st May, and \$50 on 1st November, 1882.

The plaintiff having become aware of her rights, brought this action on 24th October, 1882.

It was shewn that shortly after Charles Ross's death, Mrs. Ross had got a school teacher to write to a man named Ross, said to be a nephew of Charles Ross, informing him of Charles Ross's death: that Mrs. Ross got an immediate answer to that letter, which she got Marshall to answer for her, in which answer it was stated that she had taken out letters of administration for the personal effects, and there would be nothing done with it for twelve months before they could call her to account.

On 21st November, 1866, Marshall wrote to Finlay McGillivray, road surveyor, Nairn, as follows: "I duly received your letter of the 13th August, making enquiry about the estate of the late Charles Ross. You said that you were informed that I had something to do with the management of the affairs of the late Mr. Ross. I have nothing at all to do with the affairs more than what one neighbour may do for another. The death of the late Mr. Ross was very sudden, and from the time he was seized he never was able to speak or give any directions about the settlement of his affairs, and there being no will left things in a very disagreeable condition after his death, and before the widow could use any of the loose property either for her own support or for paying any just debt she had to take out letters of administration, and before that could be done every kind of loose property both out of the house and in it, excepting her wearing clothes, had to be valued by two valuers, and two securities given that she would give a faithful account of everything when required by the Court. I became one of her securities, and that is all that I have legally to do in the matter. According to the law of this country whatever remains of the loose property after paying all just debts one-half belongs to the widow and the other half to be divided equally amongst the other heirs. I am not exactly sure how much will be left after paying all debts, but I think it is under £16 of your money. You will see that one-half of the amount divided amongst all the heirs

will be a very small sum ; and with regard to the land the widow can keep the use of one-third of it as long as she lives, but cannot sell one foot on no consideration. At her decease the whole of the land (and the half of the loose property, if not called for before) will be divided equally amongst the heirs of the late Charles Ross, whole brothers and sisters, half brothers and sisters, either by the father's or mother's side, all is equal according to the law of this country ; so you will see that the Rosses cannot take the estate without the Clarks, and the widow is just as willing it should go to the Clarks as to the Rosses, but would like to have her living out of it as long as she lives, which any one will admit is only reasonable. The late Mr. Ross often expressed himself to me that whichever of the two lived the longest they should have the use of the property as long as they lived, and I think it would be far wrong for any one to make it otherwise, as any one that has lived a neighbour for twenty years as I have done knows very well that Mrs. Ross did her full share towards making the estate. It would certainly be very hard to have it taken from her now and given to others that never contributed a shilling towards making it ; and should the heirs come forward and put the law in force, the widow's share would be very insufficient to give her a comfortable living, and as she can keep possession of her share the heirs could do comparatively little with their share in comparison to what they could at the widow's decease, when they would get the whole. I can say that the widow is working and using the place as well as anyone could do, and any person that knows anything about farming in Canada knows very well that before she pays for all the labour and other expenses there will be little or nothing left, but as she has no other way of living, she has to do the best she can. I should like very well to hear that the heirs have come to an understanding amongst themselves and allowed the widow peaceable possession of the place as long as she lives. No person has taken any legal steps to get the property that I am aware of. There was a person in

Ireland, acting for a brother's widow of the late Charles Ross, wrote some two or three letters, and intimated that she was the only heir to the estate, her son having died soon after hearing of his uncle's death, and hearing that there was no will he came to the conclusion that he was the only heir, and willed it to his mother before he died—rather a curious proceeding. I answered the letters and told them there was a number of heirs, both by the name of Ross and Clark, that would have come in equal with the nephew, even had he lived, and there has been no word from them for the last eighteen months, as I expect they would think it rather a hopeless case. I must conclude my remarks at present as the space is small, and I hope the explanations I have given will be satisfactory. I hope you will excuse me for being so long in writing, as I have been extremely pushed with other business and a great deal from home. I will be happy to give you any information when requested. Mrs. Ross sends her best respects to your wife for the sake of her father, whom she remembers well."

Marshall did not get any answer to this letter, nor did he hear from Finlay McGillivray again till after the death of Mrs. Ross. Marshall said that he had heard Mrs. Ross say over and over again that she lived there, and that if she lived there long enough for the law to make it hers she would be the owner: that she was perfectly aware that if she had it twenty years it belonged to her: that he was with her when she received advice from a lawyer after her husband's death to take out letters of administration, and the lawyer advised her with regard to the land that the half brothers and half sisters, and full brothers and full sisters, should share it, but should such a thing be that she was left quietly with it for twenty years, it should be hers.

Linton, who was lessee of the land from April 1st, 1876, to April 1st, 1881, and was bound by his lease "to use all diligent means for keeping down and destroying Canada thistles and other obnoxious weeds," said that sometime in

June, 1876, he was going up one night and she (Mrs. Ross) was cutting the thistles and she said she was bound to, and he asked her who bound her, and she said Charley Ross's heirs: that he heard her say on another occasion that he would have his time on it the same as she would: he would have her lifetime.

Jamieson, who was lessee of the land from April 1st, 1871, to April 1st, 1876, said that he heard Mrs. Ross say during his term on one occasion that her counsel or her lawyer advised her to live on the place so that she might claim it by length of possession; and on another occasion, or on other occasions, that likely her husband's heirs would spoil the place amongst themselves after her death.

Jane Allen, a sister-in-law of Mrs. Ross, said that after Mrs. Ross got letters of administration it was her belief then that the land was to go at her decease to her husband's heirs: that at the time she was repairing the place we often said "Aunty, it is a pity you take so much trouble," when she said it was her duty to take care of the property given her for the heirs: that Mrs. Ross understood it was to go to the Rosses; her words produced the impression that the Rosses were the heirs and that she was holding possession: that Mrs. Ross spoke to her about having possession of the farm until her decease.

Elizabeth McIntosh said Mrs. Ross said one time out there that if the heirs would come forward (Mr. Ross's heirs) and give her enough for a good living, and satisfy her, she would give up the claim for the place: that was between ten and fifteen years ago. The claim was her third. She said she could claim a third. She mentioned her third: that she said on another occasion, seven or eight years ago, that all the money she had after she made a will was going to her own heirs, and it was a small sum that was going from the farm to Mr. Ross's heirs: that she told over every one of Mr. Ross's heirs, but witness could not remember them: that James Ross and John Ross were two of them: that the sum of money that was going to Mr. Ross's heirs was \$80 or something: that she

was not afraid ; the man who was doing the business with the heirs would do justice : that it was Marshall.

John McIntosh said that Charles Ross in his lifetime told him that his heir was his full brother, John Ross : that McGillivray married a daughter of Mrs. Clark by her first husband : that Mrs. Clark married Charles Ross's father for her second husband.

The learned Judge found that the plaintiff was not entitled to the land under the title set up in her statement of claim, and he directed judgment for the defendants.

June 4, 1883. *Bain* moved on notice to set aside the said judgment, and to enter judgment for the plaintiff, with costs, on the ground that the judgment was contrary to law and evidence, and the weight of evidence.

Howland, contra. One defendant, Oliver, is the tenant in possession, and holds under a lease from the other defendant, Ross, who claims as heir-at-law by virtue of the paper title. It appears that the plaintiff has no title unless a possessory title was acquired by Mrs. Ross, the person through whom the plaintiff claims. Unless she can prove beyond all reasonable doubt that Mrs. Ross acquired a title in fee by possession, the defendants in possession are entitled to retain their verdict. They are not put to the proof of any title of their own : *Carter v. Barnard*, 13 Q. B. 945 ; *Richard v. Richard*, 15 East 294, note ; *Cole on Ejectment*, 288. Neither the defendant Oliver, the tenant, nor the defendant Ross is estopped by the former's five years lease from the late Mrs. Ross. There is some evidence that Mrs. Ross's lease, though nominally for five years, was understood by both parties at the time of taking it to terminate at Mrs. Ross's death : *Patterson v. Smith*, 42 U. C. R. 1. The reservation and covenants in the lease are to Mrs. Ross alone, and do not mention heirs or assigns. Mrs. Ross's will, under which the plaintiff claims, does not purport to devise these or any lands, and the effect of the general demise is only by construction to pass lands, if she had any. The proof that these lands, in fact, were vested

in Mrs. Ross for an estate extending beyond her lifetime therefore rests upon the plaintiff, even if the tenant were still in under a lease from Mrs. Ross. There is evidence that the tenant gave up possession and attorned to the defendant Ross, as heir-at-law, after Mrs. Ross's death, under circumstances from which the knowledge and assent of the plaintiff may be implied if it is not proved. If the evidence of such knowledge and assent as would put an end to the estoppel is doubtful, the defendant in possession is entitled to the benefit of the doubt. The Court will not favour an estoppel. In any case there is no estoppel upon the defendant showing that the title under which the lessor demised is at an end: *Neave v. Park*, 8 Moore 395. The evidence does not establish a title by possession. There is evidence that Mrs. Ross occupied, under a deed or agreement, as tenant for life. In that case possession would not enlarge her title—time would not run: *Board v. Board*, L. R. 9 Q. B. 48. There is evidence that shortly after the ancestor's death the wish of the widow Mrs. Ross to be given an estate for life in the land in lieu of dower was communicated to some at least of the parties supposed to be heirs at law of her deceased husband. Her subsequent conduct and language in connection with the property would indicate that such an agreement had been, in fact, arrived at. Her own statements at different times throughout her life amount to declarations that she was seised of an estate for life, with remainder to the heirs of her deceased husband. These parol declarations, being those of a person in possession tending to cut down her apparent estate, are admissible evidence against all the world, and *a fortiori* against those claiming through her: *Baron de Bode's Case*, 8 Q. B. 208, 244. They are not acknowledgments of title under the Statute of Limitations, but evidence of a state of things which prevented the statute from commencing to run. Any evidence of such a fact is receivable: *Ryan v. Ryan*, 5 S. C. 410, 415. While this evidence afforded by Mrs. Ross's own declarations of her occupation being as lawful tenant for life is substantially

unrebutted, it is not necessary for the defendants to support those declarations by deeds or other proofs of the mode in which she became tenant for life. As against those claiming through her her own declarations are sufficient evidence from which the Court will infer whatever facts would be implied by such a statement. The legal title was in the ancestor, and the presumption of law is that the widow's possession was lawful and consistent with the continuance of the legal title. Any declarations by Mrs. Ross that she expected to make a title by possession are not admissible against us, being in her own interest, but, if admissible, do not rebut the evidence furnished by her declarations of her life-estate. The existence of a life-estate admitted by her would prevent the statute from running, and any statement that she expected the statute would give her a title, were merely statements of an erroneous conclusion of law. The witness who states the expressions relied on by the plaintiff is interested and not credible. In any case there is nothing to fix the time at which any such expressions were used, and they may be referable to a time prior to the supposed deed or agreement by which she became tenant for life. The evidence, if ambiguous, will be construed to support the presumption that the possession was lawful, and consistent with the legal title and not against it. If any doubt exists upon the whole effect of the evidence as to the plaintiff having acquired the fee simple in ouster of the legal title the defendants in possession are entitled to the benefit of it. The plaintiff is setting up a claim which the person through whom she claims always repudiated, and the Court should be astute to prevent a title being acquired by a manifest wrong which amounts to a fraud upon the true intent of the statute. *Phillipson v. Gibbon*, L. R. 6 Ch. 428; *Sanders v. Sanders*, L. R. 19 Ch. D. 373; *Queen v. Exeter*, L. R. 4 Q. B. 341; *Queen v. Birmingham*, 1 B. & S. 768; *Shepherdson v. McCullough*, 46 U. C. R. 606, were also cited.

John Bain, contra. The testatrix Madeline Ross had

been in uninterrupted possession of the property in question by herself and her tenants from the time of her husband's death in 1864 until she died in 1881, and thereby acquired a title by possession. No proceedings were taken by her to have her dower assigned, and her possession was not that of a doweress. She was in possession of the whole merely as a trespasser, and her title did not become absolute until the 1st July, 1877, when the Limitation Assessment Act of 1874, 38 Vic. ch. 16, took effect against the heirs, who were all resident out of the Province: *Macdonald v. McIntosh*, 8 U. C. R. 388; *Ryan v. Ryan*, 5 S. C. 410, and cases there cited. The defendant Ross alleges that the testatrix held the property as tenant for life under an alleged agreement with the heirs-at-law. No agreement in writing is produced or proved to have existed, but the defendant Ross relies, in support of such an agreement, solely upon a letter written, shortly after Charles Ross's death, by one Marshall to a person who is not shewn to be one of the heirs, and upon the evidence of conversation with the testatrix some years before her death. There is no evidence that Marshall was authorized to write the letter, and it is not admissible as evidence against the plaintiff; but even if admissible it does not itself constitute an agreement as alleged, nor is it evidence of such an agreement. There is no evidence of its being communicated to the heirs or acted upon by them; and there is no evidence of any letter or communication between any of the heirs and the testatrix subsequent to her husband's death in 1864. Then, the conversations are not admissible against the plaintiff; but even if they were and could be relied upon, they did not prove the existence of any agreement: *Doe dem. Quinsey v. Campbell*, 5 U. C. R. 602; *Doe Perry v. Henderson*, 3 U. C. R. 486. It must also be remembered they took place before the testatrix's title had become absolute, and while that of the heirs still existed, and are referable to the state of matters as they then existed. It is submitted that the evidence does not establish any such agreement as alleged, and there is

no evidence of any acknowledgment of the title of the heirs-at-law by the testatrix to prevent the statute running against them. Any title which the testatrix had acquired passed to the plaintiff under the will. It is contended, however, that the defendant Ross cannot dispute the title of the plaintiff in this action, unless it is to shew that her title expired upon her death, and that nothing passed to the plaintiff by her will. The defendant Oliver entered as tenant of the testatrix under a lease for five years from 1st April, 1881, and the evidence shews that he became the tenant of the defendant Ross under an agreement made during the existence of this lease. Ross now seeks to defend as landlord, but it is submitted he cannot raise any defence which was not open to the defendant Oliver: *Doe dem. Parker v. Gregory*, 2 A. & E. 17; *Doe dem. Knight v. Lady Smythe*, 4 M. & S. 347.; *Doe dem. Miller v. Tiffany*, 5 U. C. R. 79; *Christie v. Clark*, 16 C. P. 544; *Kyle v. Stocks*, 31 U. C. R. 55.

June 30, 1883. ARMOUR, J.—The evidence shewed that Charles Ross died in possession of the land in question, and he was therefore at the time of his death presumably seised in fee of the said land, and his widow was entitled to dower therein. It also shewed that his widow remained in possession of the said land after his death in 1864, until the time of her own death in 1881, and in the receipt of the rents and profits thereof for her own use.

No evidence was adduced that the widow ever acknowledged in writing, in the manner required by the Real Property Limitation Act, the title of the heirs-at-law of Charles Ross.

The right of the heirs-at-law of Charles Ross to bring an action to recover the said land first accrued to them on the death of Charles Ross, and the period limited by the said Act to them for bringing such action was determined on the 1st day of July, 1877, so that on that day the right and title of the said heirs-at-law to the said land was extinguished.

By reason of such extinguishment the possession of the widow became the title and passed by the terms of her will to the plaintiff, and so far the title of the plaintiff to recover in this action is made out.

But the learned Judge who tried this cause was of opinion that he should treat the widow's declarations and statements of the nature of her possession as evidence of an agreement with her husband's heirs that she should occupy the land during her life in lieu of dower.

That such an agreement could have been made, and that if it had been made it would have postponed the right of the heirs-at-law to bring an action to recover the said land till after the death of the widow, may be conceded : See *Leach v. Shaw*, 8 Gr. 494; *Fraser v. Gunn*, 27 Gr. 63. But I fail to see any evidence of such an agreement.

The fact that the heirs-at-law lived in Great Britain, and that if such an agreement had been made it must necessarily have been evidenced by letters written to the heirs-at-law, which could have been produced or proved by them ; the improbability of the heirs-at-law agreeing that she should occupy the whole land for her life in lieu of her right to occupy one-third of it only ; the advice given to her by the lawyer whom she consulted, that if she was left quietly with it for twenty years it would be hers, and her frequent declarations to the same effect ; her statement to Mrs. McIntosh that "if the heirs would come forward and give her enough for a good living, and satisfy her, she would give up the claim for the place—the claim was her third—she said she could claim a third—she mentioned her third—are all very much against any such agreement ever having been made.

Her statements that the land would go to her husband's heirs at her death are quite consistent with the fact that she had a right to her dower in the land ; and the only statements that tend to prove any such agreement are the statements to Linton that she was bound by her husband's heirs to cut the thistles, and the statement to Mrs.

Allen that it was her duty to take care of the property given her for the heirs.

I think it would be very unsafe to rely on these statements as evidence of such an agreement when we cannot be sure that the words narrated are the very words used by the widow, and we have to trust for their accuracy to the memory of the narrator called upon to narrate them many years after they were spoken.

They give to my mind, however, the impression that they were spoken by the widow more as shewing her moral duty to take care of the property in which others were interested than her legal obligation to do so, and these statements were made before the title of the heirs-at-law was extinguished.

It is doubtful, moreover, whether the declarations and statements of the widow were under the facts proved in this case admissible at all for the purpose of proving such an agreement, for they were not declarations and statements in disparagement of her proprietary interest, but in enlargement of it from a mere right to dower in the land to a tenancy for life of it.

The letter written by Marshall to McGillivray was, I have no doubt, written with the concurrence of the widow, and represented her views and wishes, but there is no evidence that the heirs-at-law either agreed to the terms of it or refrained from action on the strength of it.

I see nothing in the evidence which would have had the effect of preventing the heirs-at-law from bringing their action to recover the land in question at any time from the death of Charles Ross till the first day of July, 1877, when their right and title to the land were extinguished.

The only further question is, whether, the widow being in possession of the land, and being entitled to dower in the land, she ought not to be held to have been in possession of one undivided third part of the land as dowress, the result of such a holding being that the title of the heirs at law to such one undivided third would not be extinguished.

It seems anomalous that if the widow had been proceeded against by the heirs-at-law before their title was extinguished for an account of the rents and profits of the land received by her, she would have been entitled to retain one-third of the rents and profits as having been received by her *qua* dowress, and yet during all the time during which these rents and profits were accruing her possession of the land was ripening into a title under the Real Property Limitation Act on the ground that she was in possession not as dowress but as a wrongdoer.

But the Real Property Limitation Act cannot be thus evaded, for the right of the heirs-at-law to bring an action against the widow to recover the said land accrued to them upon the death of Charles Ross, and it would have been no answer by her to such action that she was entitled to dower in the said land. See *McDonald v. McIntosh*, 8 U. C. R. 388; *Leach v. Shaw*, 8 Gr. 494; *Laidlaw v. Jackes*, 25 Gr. 293, *S. C.* 27 Gr. 101; *Fraser v. Gunn*, 27 Gr. 63.

In my opinion the judgment of the learned Judge ought to be reversed and judgment entered for the plaintiff to recover the land, but it is not, under the circumstances, a case for mesne profits or for costs.

HAGARTY, C. J.—It appears to me that Mrs. Ross died seised in fee by virtue of the Statute of Limitations. A mistake on her part as to the necessity of the lapse of twenty years instead of ten cannot, I think, affect her rights. Under her understanding as to the length of the necessary bar she certainly spoke of the nature of her tenancy being only for life, but it is equally clear that she was resolved, if a sufficient time would elapse, to claim the benefit of the statute and assert her right to the whole estate. Then I can find no evidence of anything done to establish a particular tenancy between her and the true owners. There is really nothing to shew any act or consent on their part to allow her to occupy for life or any less estate. Her declarations, if admissible to prevent the operation of the statute, amount in substance to this: "Of course, my hus-

band's heirs can turn me out if they choose, and then I am left to my claim to dower. I hope they will not disturb me. I also hope that I can acquire title by length of possession."

The effect of mere verbal statements of the person in possession has been very fully discussed, and the cases fully examined, in such cases as *Keffer v. Keffer*, 27 C. P. 257; *Ryan v. Ryan*, 4 A. R. 563, 5 S. C. 410, and the Australian case of *Day v. Day*, L. R. 3 P. C. 751.

I think that the statute began to run forty days after the death of her husband, and there is no evidence to indicate the creation of any fresh tenancy at will or determination of the first tenancy, and that the title of the heirs became extinguished in 1875 or 1876, five or six years before the bringing of this action.

CAMERON, J. concurred.

Judgment for plaintiff.

[QUEEN'S BENCH DIVISION.]

REGINA V. BENNETT.

Canada Temperance Act, 1878—Information—New offence—Amendment—Waiver of summons.

An information was laid against the defendant on 28th December, for having on 25th December sold intoxicating liquor, in violation of the Canada Temperance Act, 1878. Upon a search made, intoxicating liquor was found on the premises on 1st January, 1883, in the bar of the hotel. On this evidence, the information was amended at the hearing, on the 5th January, 1883, in the bar of the hotel. On this evidence the information was amended, so as to charge the keeping and not the selling. The defendant was present at the amendment and objected to it, but waived an adjournment, and entered upon his defence. The magistrate having found the defendant guilty, drew up a conviction for keeping intoxicating liquor, which was returned to the clerk of the Peace, and filed on 17th January, 1883. On the 27th January, 1883, he drew up a second conviction, the same in all respects as the first, with the exception that it was for keeping *for sale* intoxicating liquor. This was also returned and filed.

Held, that he had power to draw up and return the second conviction, which was warranted by the evidence, set out below.

Held, also, that there was no variance between the evidence and the information to warrant an amendment, but that the evidence disclosed a new offence, and the amended information became in fact a new one, and the defendant, by his presence and by entering on his defence, had waived the service of a summons upon him.

Held, also, that it was no objection to the conviction that it was for keeping and selling, while the information charged the keeping only.

On the 6th day of March, 1883, *Hall* obtained a rule in single Court before Galt, J., calling upon the convicting Police Magistrate and the prosecutor to shew cause why a certain conviction of the defendant made by the said magistrate on the 10th of January, 1883, for a certain other conviction of the defendant made by the said magistrate, bearing date the 10th January, 1883, and substituted for the aforesaid conviction on the 27th January, 1883, or both of them, should not be quashed upon the grounds following, among others: (1) That the evidence taken did not establish the charge made under the original information, nor under the amended or substituted information, nor any offence or cause of complaint against the defendant, and did not justify the conviction. (2) The original information was improperly amended by making it charge

another and different offence alleged therein to have been committed at a different time from the offence first charged, and at a time subsequent to the laying of the information. (3) The information as amended did not charge any offence against the provisions of the Canada Temperance Act, 1878. (4) No evidence was given under the amended or substituted information to establish any offence against the defendant. (5) There was no evidence given against the defendant at the close of the case for the prosecution to place the defendant on his defence under the provisions of the said Canada Temperance Act, 1878. (6) The evidence adduced against the defendant did not satisfy the requirements of section 119 of the Canada Temperance Act, 1878, so as to raise any presumption against the defendant that the liquor found should be deemed to have been kept for sale by him, or to put him on his defence within the meaning of the said section. (7) If there was any evidence against the defendant to raise such legal presumption against him, and to put him on his defence within the meaning of the said section, such evidence was completely rebutted by the evidence for the defence, and the defendant was entitled to an acquittal. (8) There was no evidence that the Canada Temperance Act, 1878, was in force in the county of Halton. (9) The conviction did not state any offence against the Canada Temperance Act, or otherwise, committed by the defendant. (10) The second or alleged substituted conviction was improperly so substituted, and was not for the offence, if any, charged in the information, or amended or substituted information. (11) The information as amended or substituted was defective in not charging that the liquor alleged to have been kept was so kept in any house, shop, room or other place, and that a bar, counter, beer-pumps, kegs or any other appliances or preparations, such as those usually found in taverns and shops where spirituous liquors are accustomed to be sold or trafficked in, were found in such house, shop, room, or other place, and that the defendant was the occupant of such house, shop, room or other place.

This rule was enlarged before this Court.

It appeared from the proceedings brought up by *certiorari*, and by the affidavit on which the said writ was granted, that on the 28th December, 1883 (*sic*), an information in writing, not upon oath, signed by James A. Frazer, license inspector, was laid before William Hixon Young, police magistrate for the county of Halton, charging that he had just cause to suspect and believe, and did suspect and believe, that Robert Bennett, of the village of Georgetown, in the county of Halton, within the space of three months last past, to wit, on 25th December, at the village of Georgetown, in the county of Halton aforesaid, did sell intoxicating liquor contrary to the form of the Canada Temperance Act, 1878; and further, that the said Robert Bennett was previously, to wit, on 20th October, 1882, at the town of Milton, before W. H. Young, police magistrate, in and for the county of Halton, duly convicted for having on 6th October, 1882, sold intoxicating liquors unlawfully, contrary to the form of the Canada Temperance Act, 1878: that on 28th December, 1882, an information in writing and upon oath, signed by the said Frazer, was laid before the said magistrate, charging that he had just and reasonable cause to suspect, and did suspect, that intoxicating liquor, in respect to which an offence against the second part of the Canada Temperance Act, 1878, had been committed, was concealed in the dwelling house and premises of Robert Bennett, in the village of Georgetown, in the county of Halton: that his cause of suspicion was that he had been informed upon good and reliable authority that the said Robert Bennett kept intoxicating liquors contrary to the provisions of the Canada Temperance Act, 1878; and he prayed that a search warrant might be granted him to search the dwelling house and premises of the said Robert Bennett, as aforesaid, for the said intoxicating liquor.

The defendant was brought before the said magistrate on 5th January, 1883, to answer the said information, and two witnesses named Gane were called and examined in

support of the charge, whose evidence, if material at all, was in support of the charges laid in the information, and of no other charge whatever. Frazer was thereupon called, and swore that under a search warrant issued on 28th December, 1883, he searched the premises of the defendant on 1st January, 1883, and found the intoxicating liquor, which he then produced, being whiskey and beer, in the "Bennett House" in the bar; three bottles were under the bar, and one jar in the east corner, and the other jar in a press or cupboard: that the only place he found liquor was in the bar: that the bottles produced were the same as were usually used in hotels: that the bar at the Bennett House had a counter and glasses, as found in licensed hotels, except the want of a beer pump, which was old and not in working order, and did not appear to have been used for some time.

Mr. Dewar, for the prosecutor, thereupon asked for the information to be amended by striking out the word did "sell," and substituting did keep; also to change the date from December 25th, 1882, to January 1st, 1883.

Mr. Fullerton, for defendant, objected to the amendment being made: that Bennett the defendant was put on trial for a different offence to the one alleged in the information charged to have been committed at a different time. The magistrate thereupon struck out the words "twenty-fifth" "December" and "sell," in the information, and inserted in lieu thereof the words "first" "January, 1883," and "keep," and wrote across the face of the conviction the following, "Amended January 5th, 1883."

"This information is amended by striking out the word did 'sell' and substituting therefor did 'keep,' and changing the date of the offence charged from December 25th, 1882, to January 1st, 1883, the time on which the liquors were found by virtue of a search warrant, on which evidence the amendment is made." "W. H. Young, P.M."

"The defendant, by his counsel Mr. Fullerton, waives his right to an adjournment, as per sec. 116 C. T. A. 1878. "W. H. Y., P.M."

After the said amendment had been made no further evidence was given on behalf of the prosecution, but the magistrate called upon the defendant for his defence, and intimated that in default of a defence being made a conviction would be made against him of the charge in the amended information. The defendant, thereupon, was called as a witness on his own behalf, and swore that the liquors produced by Frazer were not his liquors: that he was not the owner: that the bar-room was a separate part of the house by itself: that he was not the occupant of that room on 1st January instant, nor was he on 25th December previously: that he had no control or right of control over the said bar: that he did not keep for sale any liquor in any part of his house known as the Bennett House: that he knew of no other person as his agent keeping any liquor for sale: that he did not sell any liquor on 25th of December last, neither did he authorize any other person so to do, nor since the 25th December last, nor had he kept any liquor for sale since that day: that Edward Hulse was the occupant of the house, his occupancy having commenced on 6th November last: that he took it by lease and continued until the first day of January: that the sitting-rooms were included with the bar-room: that the lease produced bore the signature of himself and Edward Hulse: that he had no interest in the business carried on by Edward Hulse, nor in the liquors found in that room, the liquors found by Frazer, nor had he power to prevent their being there. On cross-examination he swore that Hulse came along and he told him the fix he was in, and he said, "what will you take for the house: he told me was an elbow maker. He, defendant, said, that the Scott Act was in force, and he had been fined: that he told Hulse he would take ten dollars a day as rent: that Hulse paid him ten dollars a day: that he did not know he was selling intoxicating drinks: that he had not been behind the bar since Hulse took possession of the bar (to sell anything), on the first day of January instant: that Hulse left, he thought, with the

twelve o'clock train on the night of the first of January; and on re-examination he swore that there was a clause in the lease which compelled him to go in for the purpose of cleaning and warming: that the house was still at the disposal of Hulse: that he would not say that there had not been anything sold in the bar since Hulse left.

The lease was put in, being dated November 6th, 1882, and made in pursuance of the Act respecting short forms of leases between the defendant of the first part and Edward Hulse of the second part, whereby, after reciting that it had been agreed that the lessor should rent to the lessee the premises thereafter described for the purpose of carrying on the sale of temperance drinks and refreshments, and as show-rooms and sample-rooms, the lessor demised to the lessee the five sitting-rooms and the bar-room on the first floor of the brick building known as the Bennett House, to hold for one year at a daily rent, Sundays excepted, of ten dollars a day, which lease contained the usual covenants and an agreement for the cesser of the term on the premises becoming unfit for occupation by fire or other casualty, with a covenant by the lessor to supply the lessee with a sufficient quantity of coal oil to supply necessary light to said sitting-rooms and bar-room, and to scrub or cause to be scrubbed the said sitting-rooms twice each week, and the bar-room once each week, and to supply the lessee with wood for one stove in the bar-room and with coal for two coal stoves in said sitting-rooms during all the months of said term that fires might be required.

After the defendant gave his evidence the magistrate said he would reserve the case and would give judgment on the 10th instant, but no other adjournment of the case was made, and no intimation was then given that further evidence would be taken, or the case otherwise dealt with than by giving judgment on the said 10th instant. The defendant did not attend to hear judgment at the time to which judgment was reserved.

On the 10th day of January, 1883, a certificate dated that day, under the hand of the Clerk of the Peace, was put

in, certifying that the defendant was, on the 20th day of October, 1882, duly convicted of having on the 6th day of October, 1882, unlawfully sold intoxicating liquor contrary to the form of the Canada Temperance Act of 1878, and that such conviction was in full force. Fraser was also examined as a witness to prove that he was the complainant in the matter of the conviction of the 20th day of October, 1882, and that the defendant was the person thereby convicted, and the said magistrate certified that he was the magistrate who made the conviction of the defendant of the 20th day of October, 1882. The magistrate thereupon convicted the defendant, and made the following minute thereof: "I order that the defendant Robert Bennett, for this his second conviction under the provisions of the Canada Temperance Act, 1878, do pay a fine of one hundred dollars, and seventeen dollars and eighty cents costs, the said sums to be paid to James A. Frazer as license inspector for the county of Halton: that the same be paid on or before the 12th day of January, instant. In default I order that the said sums be collected by levy and distress of the goods and chattels of the said Robert Bennett, and in default of sufficient distress that the said Robert Bennett be committed to the common gaol at Milton, in the said county, for the term of two months."

The magistrate thereafter drew up a formal conviction by which he convicted the defendant: "For that he the said Robert Bennett did, on the 1st day of January, instant, at the village of Georgetown, in the county of Halton, unlawfully keep intoxicating liquors, contrary to the form of the Canada Temperance Act, 1878," and transmitted the same to, and the same was filed by, the clerk of the peace on the 17th day of January, 1883. Thereafter the magistrate drew up another formal conviction by which he convicted the defendant, "For that he the said Robert Bennett, on the 1st day of January, instant, at the village of Georgetown, in the county of Halton, did unlawfully keep for sale intoxicating liquors, contrary to the form of the Canada Temperance Act of 1878." This conviction

he transmitted to, and the same was filed by, the clerk of the peace on the 27th January, 1883, who made thereon the following memorandum :

“ Received and filed the 27th January, 1883, in substitution for conviction filed 17th January, 1883.

“ JOHN DEWAR, C. P. H.”

Both the said convictions were identical in date and form, except that in the former the offence was keeping, and in the latter keeping for sale intoxicating liquors, contrary to the form of the Canada Temperance Act, 1878.

May 25, 1882. *Fenton*, County Crown Attorney, shewed cause. As to the first objection, the Canada Temperance Act 1878, sec. 116, allows “ any other defence ” against that Act to be substituted after a variance arises between the information and evidence. There was a variance in the present case, and the information was rightly amended. The defendant was offered an adjournment of the hearing to meet the new charge substituted, but waived it, so that no injustice was done him. The circumstance that the date of the new offence was subsequent to the date of the information is immaterial. See Criminal Procedure Act, 32-33 Vic. ch. 29, sec. 23, which expressly enacts that no indictment shall be insufficient for stating the offence to have been committed on a day subsequent to the finding of the indictment. As to the second objection, it was not raised at the hearing. The information sufficiently indicates that the charge was keeping for sale, for this is the only kind of keeping of liquor that is an offence under the Act. The information, as it originally stood, was for selling liquor, and all the earlier evidence was directed to proof of a sale, and when the charge of keeping was substituted the defendant thoroughly understood what was meant. He was charged as a tavern keeper, and all the evidence pointed to a keeping for sale. By sec. 27 of the Criminal Procedure Act, 32-33 Vic. ch. 29, the short forms given in that Act for serious crimes are declared to serve as a guide, and the indictment is to be held good if the offence intended to be charged

can be understood from it, and it is plain in the present case that all parties understood that the charge was keeping liquor for sale. As to the third objection. The practice allows magistrates to amend their conviction at any time before the return of the *certiorari*: *Paley* on Convictions, 5th ed. 289. As to the 4th objection. The evidence shows that the liquor was found in the defendant's hotel, and that the lease put in is manifestly a collusive attempt to shield the defendant from prosecution for the traffic in intoxicating liquors carried on in his house. By secs. 117 & 118 of the Canada Temperance Act, 1878, the whole of the objections must fail to invalidate the second or amended conviction, because it contains all the essential requisites of sec. 117, and the Act expressly declares that it shall not be deemed invalid or insufficient. No *certiorari* should have been issued in the present case, the conviction being under the Canada Temperance Act 1878, sec. 111, expressly providing that no conviction in any such case shall be removed by *certiorari* or otherwise into any of Her Majesty's Superior Courts of Record where the conviction is made by a police magistrate. The words "any such case" refer to any offence against the second part of the Act. The *certiorari* therefore ought to be quashed as improvidently issued.

Fullerton, contra. The words "any such case" in sec. 111 refer only to offences against section 110, because section 118 implies that convictions are to be brought up on *certiorari*. Sec. 111 contains two independent clauses; the first prohibiting removal of convictions by *certiorari*, and the last prohibiting appeals when convictions are made by the officials named. The first clause is, therefore, repugnant to other provisions of the Act, and must be rejected. There was no evidence given against the defendant at the close of the case for the prosecution to place the defendant on his defence for any offence whatever, no evidence having been given upon the amended information. There was no evidence to satisfy the requirements of section 119

of the Act, that the liquor was kept for sale; and the evidence shews that if any one is liable to prosecution for any offence it is the lessee and not the defendant.

June 30, 1883. ARMOUR, J.—It was conceded that the conviction filed on the 17th day of January, 1883, was bad as not being for an offence under the Canada Temperance Act, 1878, and unless the conviction filed on the 27th day of January, 1883, could be substituted for it, the conviction of the defendant must be quashed.

By the 107th section of the Canada Temperance Act, 1878, 41 Vic. ch. 16, it is provided that "Every offence against the second part of this Act may be prosecuted in the manner directed by the Act respecting the duties of Justices of the Peace out of Sessions in relation to summary convictions and orders * * and all the provisions contained in the said Act shall be applicable to such prosecutions," &c.

By section 42 of the last mentioned Act if the Justice or Justices "convict or make an order against the defendant a minute or memorandum thereof shall then be made, for which no fee shall be paid, and the conviction or order shall afterwards be drawn up by the Justice or Justices in proper form under his or their hand and seal, or hands and seals." And by section 72 of the same Act, "Every Justice of the Peace, before whom any person shall be summarily convicted of any offence by virtue of this Act, shall transmit the conviction to the Court of General or Quarter Sessions, or to the Court discharging the functions of the Court of General or Quarter Sessions as aforesaid, or to any other Court or Judge to which the right to appeal is given by section 65 of this Act, as the case may be, in and for the district, county, or place wherein the offence has been committed, before the time when an appeal from such conviction could be heard, there to be kept by the proper officer amongst the records of the Court * * and upon any indictment or information against any person for a subsequent offence a copy

of such conviction, certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be proved to be unappealed against until the contrary be shewn."

It might be argued that inasmuch as section 110 of the Canada Temperance Act, 1878, takes away the right of appeal from such a conviction as the present, made by a police magistrate, it was no part of his duty to transmit such conviction, as by the said section required, but it was the duty of Justices so to transmit before the statute.

In *Rex v. Eaton*, 2 T. R. 285, Buller, J., said that a Justice of the Peace ought in every instance to return a conviction by him to the Sessions whether the party appeals or not, or whether an appeal is or is not given, that the Crown may not be deprived of its share of forfeitures: See also *Ex parte Hayward*, 3 B. & S. 546.

I think it was the duty of the police magistrate to draw up in proper form under his hand and seal, and transmit the conviction of the defendant to the Court of General Sessions of the Peace; and the question is, having done so could he afterwards draw up another conviction changing the statement of the charge of which the defendant was adjudged in the first conviction to be guilty, but identical with the first conviction in all other and formal respects, and transmit it also to the Court of General Sessions of the Peace, either in assumed substitution of the first conviction or otherwise.

In *Rex v. Barker*, 1 East 186, an application was made for a criminal information against the defendant, Mayor of the borough of Great Yarmouth. Under these circumstances a warrant of distress issued on 20th October, 1800, under the hand and seal of the defendant, against one S., on whose application to the defendant's clerk for copies of the proceedings, the clerk, on the 21st, furnished S. with a copy of a conviction, dated 3rd October, 1800, which was compared with the original signed by the defendant, then being upon the file of informations and other proceedings taken and

recorded before the defendant during his mayoralty : that under a writ of certiorari the defendant had returned a conviction in a different form, which being compared with the copy delivered to S. shewed that they related to the same offence committed on the same day and under the like circumstances, but the conviction returned was drawn out more at length, and in a more formal manner than that from which S.'s copy had been taken. It was pressed by counsel for the application that the conduct pursued by the defendant tended to vexation and oppression, and was illegal : that however magistrates might be indulged with a reasonable time for drawing up their convictions in proper form, yet, when regularly signed and issued by them to the parties and acted upon as such, by levying a distress under them, they ought to be concluded from altering them afterwards. Counsel for defendant suggested that the copy with which S. had been furnished was merely intended as a copy of the minutes of the conviction, and that it was the constant practice of magistrates to proceed in this manner, first taking down minutes of the proceedings on which their judgment was founded, and afterwards having them drawn up in form before they were filed of record. Lord Kenyon, C. J., said : " If the magistrate has done no more than return the conviction in a more formal shape instead of sending it up in the informal manner in which it was first drawn, and supposing that the facts as they really happened will warrant him in the return he has now made, the contrary of which is not imputed, I am of opinion that it was not only legal but laudable in him to do as he has done, and he would have done wrong if he had acted otherwise. It is a matter of constant experience for magistrates to take minutes of their proceedings without attending to the precise form of them at the time when they pronounce their judgment, to serve as memorandums for them to draw up a more formal statement of them afterwards to be returned to the sessions ; and it is by no means unusual to draw up the conviction in point of form after the penalty has been levied under the

judgment, nor is there any legal objection to this method, provided the facts will warrant them in stating what they do. It is no answer to say that a party convicted may be thereby induced to incur an unnecessary expense in suing out a certiorari to get rid of an informal conviction; for a mere informality in the manner of drawing up the conviction ought not to be the inducement for removing it into this Court, but some substantial defect in the justice and legality of the proceeding itself before the magistrate."

In *Selwood v. Mount*, 9 C. & P. 75, an action of trespass to land and goods, defendant's counsel said, "I ought to mention also that a conviction was returned by the magistrates to the Quarter Sessions, and that that conviction is open to some objections. Since that the magistrates have drawn up another conviction which is free from those objections. I submit that they are right in doing so. It has long been the practice for magistrates not to draw up their convictions at the time. If the conviction returned to the sessions is good *cadit quæstio*, and if it is not it is a nullity and nothing at all; and the magistrates are then in the same situation as if no conviction had ever been returned to the sessions." Alderson, B.: "I do not see any impropriety in the magistrates drawing up another conviction in a more formal shape, provided that the latter is according to the truth and supported by the facts of the case." Both the convictions were put in, and the learned Baron being of opinion that they were in point of law no answer to the action, there was a verdict for the plaintiff.

A case is mentioned in a note to *Chaney v. Payne*, 1 Q. B. 712, of *Mason v. Carpenter*, at the Nottingham Spring Assizes, 1840, when Littledale, J., received a second conviction in evidence after a former one had been returned to the sessions, reserving however the question of its admissibility. The second conviction, however, being held bad, the question as to the reception of it in evidence was not raised.

In *Chaney v. Payne*, 1 Q. B. 712, an action of trespass for false imprisonment, on the trial before Tindal, C.J.,

it appeared that the defendant was a Justice of the Peace, and that the plaintiff had been brought before him in September, 1837, and convicted under sec. 70 of Stat. 6 Geo. IV., ch. 125, for continuing in the conduct and charge of a ship after a licensed pilot had offered to take charge of it. Upon this conviction he was committed to prison, and at the following Michaelmas Quarter Sessions the conviction was returned and duly filed among the records of the Court. In the following January he was brought before Patteson, J., and discharged, upon the ground that the conviction as recited in the commitment was bad on the face of it, for want of stating that the offer of the licensed pilot was made to or in the presence or hearing of the plaintiff, or was in any way brought to his knowledge. *Regina v. Chaney*, 6 Dowl. P. C. 281. The conviction itself was not then produced, sec. 82 of the above statute having provided that no proceeding taken under it should be removed by writ of *certiorari*. After this decision of the Court a second conviction was drawn up by the defendant, in which the defects which had been pointed out in the first were supplied, and evidence was adduced to shew that the clerk of the plaintiff had again obtained possession of the first conviction from the clerk of the peace, and had ultimately redelivered it, together with the amended one, to the clerk of the peace in March, 1838.

Under the above circumstances Tindal, C. J., was of opinion that the second conviction was not admissible in evidence for the defendant. The plaintiff thereupon had a verdict, with liberty to the defendant to enter a nonsuit if the Court should be of opinion that the second conviction ought to have been received in evidence, and that if received it would have been a bar to the action.

Lord Denman, C. J., said : " We are of opinion that the second conviction was good on the face of it, and would, if admissible in evidence at all, be a bar to the action.

* * The only remaining question, and indeed the only one on which any difficulty arises, is whether this second conviction was admissible in evidence, and this depends upon

the right of the magistrate to substitute a good conviction for a bad one under the circumstances which have occurred. The cases of *Rex v. Barker*, 1 East 186; *Rex v. Allen*, 15 East 333; *Basten v. Carew*, 3 B. & C. 649, and *Rex v. The Justices of Huntingdon*, 5 D. & R. 588, establish clearly that the magistrates are not bound by the conviction first drawn up, whether it be merely a note of the conviction or drawn up in a formal manner as the conviction itself, but that they are at liberty when called upon by appeal to return the conviction to the Quarter Sessions, or by *certiorari* into this Court, to draw up and return a more formal conviction, correcting any errors which may have existed in that first drawn up, provided the latter conviction be according to the truth and the facts of the case as proved before the magistrates. By allowing this to be done the public are protected against the evil of a failure of justice for defect of form when the facts are well proved, and the magistrates are protected from being harrassed by vexatious actions when they have done what justice and the merits of the case required, but have inadvertently made some slip in the form of the document drawn up. The general rule of law and practice was not and could not be disputed, but it was contended for the plaintiff that this rule must be understood with some limit, and that after the magistrate had returned the conviction to this Court, or to the Court of Quarter Sessions, it was too late for him to draw up another and different one in order to protect himself in an action."

He then referred to the ruling of Alderson, B., in *Selwood v. Mount*, and said: "It is the opinion of the learned Judge, apparently, but not necessarily, opposed to that of Lord Chief Justice Tindal in the present case, both opinions being given without full argument at *Nisi Prius* * * Upon the evidence, we think that the first conviction must be taken to have been returned to the Clerk of the Peace and filed among the records of the sessions in the month of October, 1837. The question therefore is, whether after it has been so returned, and after the discharge of the

plaintiff by this Court, it is too late to cure any defect in it by substituting a more formal one. The counsel for the defendant argued that a conviction is a record when first signed by the magistrate: that its character is not altered by being returned to the sessions where it is deposited merely for safe custody, and that if it may be altered before such return there is no reason why it should not afterwards. Convictions have undoubtedly always been treated as records, and for that reason they were, prior to 4 Geo. II. ch. 26, required when filed to be in Latin; therefore the returning them either to this Court or to the sessions does not alter their character, and possibly it may be competent to the magistrates, even after such return of an informal conviction, to return another formal one before any motion is made to quash the conviction or appeal heard. But it can hardly be contended that after a conviction has been removed by *certiorari* and quashed by this Court, or by the sessions on appeal, any other conviction can be effectually drawn up. If it could, the party who has been discharged from punishment by competent authority might again be put in jeopardy and punished for the same offence.

Again, if such a course could be pursued, the Stat. 43 Geo. III. ch. 141, would have been wholly unnecessary, and would have put the magistrate in no better position than before. If, by drawing up another formal conviction after an informal one had been quashed, he could have protected himself altogether from any action, surely the Legislature would never have passed an Act to forbid the plaintiff after a conviction has been quashed from recovering more than the penalty levied and twopence, without costs, unless he can prove malice and want of probable cause. We may, therefore, safely lay it down as law that it is too late for a magistrate to draw up a second conviction after the first has been quashed. In the present case, however, the first never was quashed, but we are of opinion that the decision in this Court, under the circumstances and for the purposes of this argument, has the same effect as quash-

ing the conviction. That decision, indeed, proceeded upon the defect apparent on the commitment, and on the recital therein of a bad conviction, but as the recital was true and the commitment was bad, we think that the discharge of the plaintiff according to that decision put an end to the proceedings, and rendered it equally incompetent to the defendant to draw up any other conviction upon the original information, or take any other steps in the matter, as if the conviction had been actually quashed."

In *Charter v. Greame*, 13 Q. B. 216, an action of trespass for false imprisonment, the plaintiff was committed under 7 & 8 Geo. IV. ch. 30, sec. 40 of which enacts "that every Justice of the Peace before whom any person shall be convicted of any offence against this Act shall transmit the conviction to the next Court of General or Quarter Sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the Court, and upon any indictment or information against any person for a subsequent offence a copy of such conviction certified by the proper officer of the Court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shewn." A conviction was drawn up, and a commitment issued thereunder, and the plaintiff was committed to the house of correction, and was brought before Rolfe, B., by *habeas corpus*, when the commitment was objected to, but the prisoner was remanded, the learned Judge not considering the commitment bad. Afterwards the defendants were served with notice of action. The conviction was afterwards filed at the next Easter Quarter Sessions after the committal, but a second conviction was afterwards drawn up and filed at the following Midsummer Quarter Sessions. The commitment and both the convictions were offered in evidence for the defendants. At the trial the counsel for the plaintiff objected, amongst other things, that the second conviction could not be admitted in evidence, the first conviction having been filed.

Pollock, C. B., received the evidence and directed a verdict for the defendants.

Denman, C. J., said: "If, instead of remanding the prisoner, the Judge had discharged her, and the conviction had then been transmitted to the April Sessions, as directed by the statute, the case would then have resembled in circumstances that of *Chaney v. Payne*, and that conviction must have been taken to have been the conviction recited in the commitment and determined upon by the Judge, and another conviction subsequently drawn up and transmitted to a subsequent sessions would not have been admissible. The Judge, however, in this case remanded the prisoner upon the commitment and the conviction as recited in it, before any formal conviction had been transmitted to the Quarter Sessions at all. Nothing had taken place equivalent to quashing the conviction, and the case is clearly, we think, distinguishable from that of *Chaney v. Payne*, inasmuch as it wants the circumstance which was the ground of the decision in that case. We are also of opinion that section 40 of the Statute is merely directory, and that transmitting a conviction to the April Sessions does not preclude the right of the magistrate to draw up and produce in evidence another conviction transmitted to a subsequent sessions." See, however, *Proser v. Hyde*, 1 T. R. 414; *Ex parte Hayward*, 3 B. & S. 546.

In *Regina v. Smith*, 35 U. C. R. 518, Richards, C. J., said: "As to filing an amended conviction, the practice, as we understand it, in moving to quash a conviction is this. When the conviction is returned it is filed. Up to the time of return and filing the Justices may amend the conviction, but after the filing of the papers no amendments can be made. By analogy, after notice of appeal is given, and the time for hearing the appeal has arrived, we should say no amendment could then be made to the conviction after the proceedings in appeal have been entered on before the Court." See also *Wilson v. Graybiel*, 5 U. C. R. 227.

It is clear from these authorities that the magistrate,

having drawn up and transmitted the first conviction to the Court of General Sessions of the Peace, was not precluded from drawing up another conviction changing the statement of the charge of which the defendant was in the first conviction adjudged guilty, and transmitting it also to the Court of General Sessions of the Peace, provided the facts proved before him would warrant him in so drawing up such other conviction ; and I think the facts proved before him did warrant him in so drawing up such other conviction.

I think it was sufficiently proved that the Canada Temperance Act, 1878, was in force in the county of Halton, and section 99 of that Act provides that " No person unless, &c.,
* * shall within such county by himself, his clerk, servant or agent expose or keep for sale, or directly or indirectly on any pretence, or upon any device, sell or barter, or in consideration of the purchase of any other property give to any other person any spirituous or other intoxicating liquor, or any mixed liquor, capable of being used as a beverage, and part of which is spirituous or otherwise intoxicating."

Section 100 provides that " Whoever by himself, his clerk, servant, or agent, exposes or keeps for sale, or directly or indirectly on any pretence, or by any device sells or barter, or in consideration of the purchase of any other property gives to any other person any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and a part of which is spirituous or otherwise intoxicating, in violation of the second part of this Act (that is sec. 99) shall be liable," &c.

Section 116 provides that, " in the event of any variance between the information and evidence adduced in support thereof, the justices or magistrate, or other officer may amend or alter such information, and may substitute for the offence charged therein any other offence against the provisions of the said Temperance Act of 1864, or of this Act : but if it appears that the defendant has been materially misled by such variance, the said justices or

magistrate shall thereupon adjourn the hearing of the case to some future day, unless the defendant waives such adjournment."

And section 119 provides that, "when in any house shop, room, or other place in any municipality in which any prohibitory by-law passed under the provisions of the Temperance Act of 1864, or of this Act, is in force, a bar counter, beer pumps, kegs, or any other appliances or preparations similar to those usually found in taverns and shops where spirituous or fermented liquors are accustomed to be sold or trafficked in are found, and spirituous, fermented or other intoxicating liquor is also found in such house, shop, room or place, such liquor shall be deemed to have been kept for sale contrary to the provisions of such Act, unless the contrary is proved by the defendant in any prosecution, and the occupant of such house, shop, room, or other place shall be taken conclusively to be the person who keeps therein such liquor for sale."

I do not think that in this case there can be said to have been any variance between the information and evidence adduced in support thereof within the meaning of the 116th section to warrant the amendment, alteration, or substitution therein provided for. The evidence of Frazer who laid the information, shewing that a different offence from that charged in the information had been committed by the defendant at a time subsequent to the laying of the information, cannot be said to be evidence in support of the information.

The information was not on oath, nor did it require to be, and it was amended in the presence of and at the request of the prosecutor, and became then in effect a new information. The defendant was not bound to appear to answer it without being duly summoned, but he did so appear and entered upon his defence and gave evidence, and thereby waived the necessity for a summons.

In *Rex v. Stone*, 1 East 639, Lord Kenyon, C. J., said : "Justice requires that a party should be duly summoned

and fully heard before he is condemned, but if he be stated to be present at the time of the proceeding and to have heard all the witnesses, and not to have asked for any further time to bring forward his defence, if he had any this at all times has been deemed sufficient."

See also *Rex v. Johnson*, 1 Str 261; *Rex v. Barret*, 1 Salk. 383, 2 Salk. 428; *Rex v. Aiken*, 3 Burr. 1785.

The amended information did not charge the defendant with keeping intoxicating liquor for sale contrary to the form of the Canada Temperance Act, 1878, but only with keeping it contrary to the form of that Act; but the only keeping it contrary to the form of that Act was a keeping it for sale, and that this was meant by the information was well understood by the defendant, as is apparent from the evidence given by him, and the defence set up by him.

It was for the magistrate to determine whether the defendant had by his evidence rebutted the presumption raised against him under the provisions of the 119th section, and we cannot constitute ourselves a Court of appeal from his decision in this regard.

Besides, by section 117 it is provided that, "no conviction * * under this Act shall be held insufficient or invalid by reason of any variance between the information and conviction, or by reason of any other defect in form or substance, provided it can be understood from such conviction that the same was for an offence against this Act, within the jurisdiction of the Justices or magistrate or other officer who made or signed the same, and provided there is evidence to prove such offence, and no greater penalty is imposed than is authorized by such Act."

By the 111th section it is provided that, "no conviction, judgment or order * * shall be removed by *certiorari* or otherwise into any of Her Majesty's Superior Courts of Record." This provision does not, however, apply where there is an absence of jurisdiction, but I see no want of jurisdiction in the second conviction, nor in the proceedings upon which it was made.

In my opinion the rule should be absolute to quash the

conviction filed in the office of the Clerk of the Peace on the 17th of January, 1883, and should be discharged as to the other, and that a *procedendo* should issue.

Under the circumstances we do not give any costs.

HAGARTY, C. J., and CAMERON, J., concurred.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

ONTARIO INDUSTRIAL LOAN AND INVESTMENT COMPANY V.
LINDSEY ET AL.

*Registry of instrument not authorized by Registry Act—Cloud on title—
Damages—Parties—Notice of action.*

S., believing that his father (still living, but of unsound mind) was entitled to certain lands to which the plaintiffs claimed title, took the advice of his solicitor, C., who, being advised by counsel, instructed by S., prepared and registered an instrument, whereby he, S., stated that he claimed the lands, and would upon the demise of his father commence proceedings for their recovery. The plaintiffs were thus obstructed in the sale of their lands, and brought an action against S., C., and the registrar, to remove the instrument from the register, as being a cloud on the title, and for damages. Proudfoot, J., dismissed the action as against the registrar, but gave judgment, with a reference to assess damages, against S. and C.

Held, that the Registry Act did not authorize the registration of such an instrument; and, CAMERON, J., dissenting, that an action would lie for its removal.

Per CAMERON, J.—The instrument, being on its face one which did not affect the title, was not removable by the Court, and the action should be dismissed.

Per HAGARTY, C. J., and ARMOUR, J.—The act of registration was a wrongful one, and all parties concerned in it were responsible to the plaintiffs, and the registrar was, therefore, a proper party; but, *per* HAGARTY, C. J., he was not a necessary party.

Per HAGARTY, C. J.—There being no *mala fides*, the damages should be nominal.

Per CAMERON, J.—The registrar was not a proper person, having acted in good faith, and in the belief that he was acting within the scope of his duty; nor was C., the solicitor, a proper party, he having acted to the best of his judgment and ability in advising his client, after consulting counsel.

STATEMENT of claim :

1. The plaintiffs are owners in fee simple of certain lands in the city of Toronto.

2. The plaintiffs have caused said land to be sub-divided into city and villa lots, and are endeavouring to sell the same.

3. On 7th June, 1882, the defendants Caston and Shaw presented to defendant Lindsey, to the Registrar of the city of Toronto, the following document: "Know all men by these presents that I, George Shaw, of the city of Toronto, do hereby declare that I claim the lands and premises known and described as follows;" (setting out the lands) and requested the said Lindsey to register said document, and the said Lindsey thereupon received the said document and caused the same to be registered.

4. The said instrument was prepared by the said defendant Caston, a solicitor of this Court, and executed by the defendant Shaw, with the design and for the purpose of slandering, casting doubts upon and injuring the plaintiffs' title to the said lands, and of preventing them from making sales or otherwise dealing with the said lands, and it was in furtherance of the said malicious design and purposes that they caused the said document to be registered against the title to the said lands.

5. The defendant Lindsey carelessly and negligently and without any warrant or authority in law, received and registered the said document, and by such conduct on his part the defendants Caston and Shaw were enabled to execute their said design and purpose.

6. In consequence of the said registration of the said document many persons who were in negotiation with the plaintiffs to purchase portions of the said lands, have been deterred from becoming purchasers, and refused to deal with the plaintiffs, and the plaintiffs have lost many profitable sales and suffered great loss and damage in consequence, and they have been unable to make sales or dispose of the said lands or any part thereof, the registration of the said document operating as a cloud upon the plaintiffs' title to

the said lands, and preventing and deterring intending purchasers from dealing with the plaintiffs in respect thereof; and unless the registration of the said document be cancelled, the said lands will be rendered wholly useless to the plaintiffs.

7. The plaintiffs caused frequent applications to be made to the defendants to cancel the said document or the registration thereof, but they have neglected and refused to do so.

8. The defendants Caston and Shaw threaten and intend, and they will, unless restrained, take other proceedings and do other acts of injury to and slander of the plaintiffs' title to said lands.

The plaintiffs claimed :

1. Cancellation of the registration of the said document.

2. \$10,000 damages for the said wrongful acts.

3. An injunction restraining the defendants Caston and Shaw from taking any further proceedings or doing any further acts of injury to and slander of the plaintiffs' title

4. Payment of the plaintiffs' costs, and for further relief.

Statement of defence of the defendant Lindsey :

1. No notice of action.

2. Denial of malice on his part, and the belief on his part that the instrument was one capable of being registered, and that he had reasonable and probable cause for so believing, and said registration was made by him in the *bonâ fide* belief that said instrument should be registered by him at the request of the other defendants; and further, that in registering said instrument he was in no way actuated by any desire to prejudice and interfere with the plaintiffs' right, or in any way to assist the other defendants in their alleged wrongful act; and the said defendant Lindsey claimed the benefit of this objection as if he had demurred

3. That he had no power to cancel the registration of the said instrument after its receipt by him.

Statement of defence of defendant Caston.

1. That prior to and at the time of the execution of the

document set forth in the third paragraph of plaintiffs' statement of claim, he was the solicitor for the defendant Shaw.

2. The defendant was the only son and heir apparent of one George Shaw, who had for many years been a lunatic.

3. Some months before the execution and registration of the said document, said Shaw consulted him as his solicitor with regard to the property set forth in the said statement of claim, and he instructed him (Caston) that he claimed to be entitled to said property on the death of his father, and he declared that so soon as he could raise the necessary funds he would take legal proceedings to have it declared that the said property, or the equity of redemption therein, was vested in his said father, notwithstanding certain conveyances thereof which had been made by certain parties claiming to be entitled to said property under a certain decree of foreclosure; and he furthermore instructed him that the plaintiffs were negotiating for the purchase of said property.

4. Before plaintiffs had carried out their intended purchase they were notified of the claim of said defendant Shaw to said property, and were informed of his intention to protect his interests therein, but notwithstanding they proceeded to complete said purchase and to subdivide said lands.

5. The defendant Shaw, subsequently finding that plaintiffs had paid no attention to said notice, but were offering said property for sale, again consulted him (Caston) as to how it would be possible to prevent said estate passing into the hands of innocent purchasers for value without notice of his said claim.

6. The defendant Caston thereupon, acting in entire good faith and wholly as the solicitor of defendant Shaw, and without any malice, drew up said document, and the defendant Shaw approved the same, and it was duly executed by him and registered by his instructions without malice or evil design, and wholly for the purpose of preserving, if possible, his *bonâ fide* claims to the said property.

7. That the said document was capable of registration, and that the registration thereof ought not to be cancelled or interfered with.

Statement of defence of defendant Shaw.

1. That said lands were prior to 1850 owned and occupied by his father.

2. About the year 1848 his said father became a lunatic, and in 1854 one Harman was appointed committee of his estate.

3. The said Harman never gave security, and did not comply with the conditions of his appointment, and never in fact was appointed or became committee of the said estate.

4. On the 1st May, 1885, said Harman pretended to execute a mortgage to the Trust and Loan Company of Upper Canada, in the name of said lunatic, for £1000 upon the security of said lands, and subsequently he permitted an order to issue which purported to foreclose the interest of said lunatic in said premises, and allowed a conveyance thereof to one Crawford, on the 9th February, 1869, to be made.

5. In 1875 one Alexander Shaw, brother of said lunatic, applied to the Court to be appointed committee of said estate, and was duly appointed, and afterwards obtained leave to file a bill to impeach said pretended appointment of said Harman, which bill was dismissed, and the decree affirmed on appeal.

6. Said estate had been so impoverished that the plaintiffs in the said suit were unable to carry the appeal further, but defendant Shaw intended, as heir-at-law, upon the death of his father, to proceed for recovery of said estate. Said defendant claimed that said Harman never was committee of said estate, and had no power to mortgage said lands, and that the subsequent foreclosure and sale were null and void as against said lunatic and his representatives.

8. Feeling fully persuaded of the truth and validity

of this contention, said defendant consulted defendant Caston, as his solicitor, prior to the purchase of said land by said plaintiffs, and caused them to be notified of his said father's claims and of his own prospective claims to said property.

9. In order to prevent said lands falling into the hands of a purchaser for value without notice, defendant instructed his co-defendant Caston to prepare and register a paper, in order to notify the purchaser of the true position of matters, and in accordance with such instructions a paper was in good faith prepared and registered.

10. The defendant denied that said instrument was drawn up and prepared by his co-defendant Caston and executed maliciously, but that he acted *bonâ fide*.

The action was tried at the last fall sittings, in Chancery, for the city of Toronto, before Proudfoot, J., when it was shewn by the plaintiffs that the document set forth in the statement of claim was drawn up by the defendant Caston, a solicitor, for and at the request of his client, the defendant Shaw, and that it was taken to the registry office by the solicitor's clerk, and registered by the defendant Lindsey in the usual manner.

The facts and circumstances that gave rise to this action were closely connected with the suit of *Shaw v. Crawford*, reported in 4 A. R. 371, which was a suit brought by the committee of George Shaw, a lunatic, to redeem the property in question, the committee alleging that the mortgage under which the Trust and Loan Company had foreclosed and sold to the late John Crawford was never executed so as to bind the lunatic, and that it had been sold at a gross undervalue; and also alleging that the person who had formerly acted as committee was never properly appointed, and had been guilty of fraud in the conduct and management of the estate.

The present plaintiffs put in the decree, orders, and other documents referred to in *Shaw v. Crawford*, and gave evidence to shew that they had purchased from the representatives of the late John Crawford for the sum of

\$120,000, of which sum \$40,000 was paid in cash, and a mortgage given back to secure the remaining \$80,000. It was also shewn that owing to the registration of this document several persons had objected to the title, and had refused to carry out their contracts of purchase, and the plaintiffs claimed that they had in this manner lost \$10,000, and that their title was practically unmarketable. It also appeared that default had been made by the plaintiffs in payment of interest due to the Crawfords under the mortgage for \$80,000.

The defendant Lindsey said that he did not know whether such a document came within the description of instruments which may be registered or not.

The defendant Caston stated that the document being under seal, he considered it came under the head of a deed or deed poll, and that he had consulted counsel as to the matter, and concluded that such a document could be registered : that he had been solicitor for the plaintiff in *Shaw v. Crawford*, and considered that, notwithstanding the judgment of the Court of Appeal in *Shaw v. Crawford*, the Shaws were entitled to the property in question, for in that case the Court had not the plaintiff's evidence before it, such evidence having been rejected by the then Chancellor at the hearing ; and that in the preparation and registration of the document in question he acted *bonâ fide*, without malice, and only as solicitor for the defendant Shaw.

The defendant Shaw, who was a son of George Shaw, the lunatic, stated that he considered that his father was legally the owner of the property in question : that his uncle, Alexander Shaw, was the only committee of the lunatic's estate, and that the committee, as he believed, was making a strong effort to take the case to the Privy Council. He furthermore stated that his belief that the property belonged to his father was a *bonâ fide* belief, and that upon his father's death he intended taking proceedings to recover it.

On the 25th day of November, 1882, the learned Judge

delivered judgment, holding that the document in question did not come within the category of instruments which may be registered under the Registry Act (R. S. O. ch 111, sec. 2): that he considered himself bound by the decision in *Shaw v. Crawford*, to the extent of declaring that the lunatic had no title as against the Crawfords, and therefore as against the plaintiffs: that it having been admitted by the plaintiffs that the defendant Lindsey had acted *bonâ fide*, and without malice, the action must be dismissed as against him, with costs: that although he was willing to assume that the defendant Shaw instructed the registration of his claim with the *bonâ fide* intention of protecting his own interests, yet the decision in *Shaw v. Crawford* was conclusive that such a claim was without reasonable or probable cause, in which case express malice must be implied: that as regarded the defendant Caston, there was no distinction between principal and agent in a tort; and inasmuch as the plaintiffs had suffered damage by the act of these two parties, a decree must be made against them, with costs, and a reference directed as to damages.

The following was the decree:

1. This Court doth declare that the lunatic George Shaw and George A. Shaw, in the pleadings mentioned, have no title or interest in the lands and premises set forth in the statement of claim in this action; and that the instrument referred to in the pleadings is void, and the registration of said instrument forms a cloud upon the plaintiff's title to the said lands, and doth order and decree the same accordingly.

2. And this Court doth further declare that the said instrument ought to be cancelled, and the registration thereof vacated and discharged, and doth order and adjudge the same accordingly.

3. And the Court doth further order and adjudge that it be referred to the Master in Ordinary of the Supreme Court of Judicature for Ontario to enquire and state what damage (if any) the plaintiffs have sustained by reason of the registration of the said instrument by said defendants Caston and Shaw, and it is further ordered and adjudged that the said defendants Caston and Shaw are to pay the amount of said damage (if any) forthwith after said Master shall have made his report.

4. And this Court doth further order and adjudge that the defendants Caston and Shaw do forthwith after taxation pay the costs of the plaintiffs up to and inclusive of the hearing.

5. And this Court doth further order and adjudge that the said action be and the same is hereby dismissed as against the defendant Lindsey, with costs to be paid by the plaintiffs to the said defendant Lindsey forthwith after taxation.

6. And this Court doth further order and adjudge that the costs subsequent to this order do abide the result of the said reference as to damages, and the party against whom the balance is found upon said reference do pay to the party in whose favour said balance is the amount of such costs forthwith after taxation thereof by said Master.

The action was subsequently transferred to this Division, and was set down by way of appeal from the judgment of Proudfoot, J.

W. Cassels and *A. C. Galt*, for the defendants Shaw and Caston. The judgment was wrong in awarding damages against these defendants, as also in ordering the removal from registry of the notice. There was no title shewn in the plaintiffs: *Hurd v. Billington*, 6 Gr. 146; *Dynes v. Bales*, 25 Gr. 593; *Truesdell v. Cook*, 18 Gr. 532; *Wren v. Weild*, L. R. 4 Q. B. 730; *Pitt v. Donovan*, 1 M. & S. 648; *Steward v. Young*, L. R. 5 C. P. 122. The Judge found the notice was *bonâ fide*, and that there was no malice; therefore no action lies: *Ashford v. Choate*, 20 C. P. 473; *Boulton v. Shields*, 3 U. C. R. 21; *Clark v. Molyneux*, L. R. 3 Q. B. D. 237. *Pitt v. Donovan* shews it is the duty of a party to give a notice of the kind. See also *Smith v. Spooner*, 3 Taunt. 246; *Coxhead v. Richards*, 2 C. B. 569. But if Shaw supposed he had a right no action lies: *Revis v. Smith*, 18 C. B. 143. As to Caston's non-liability, see *Watson v. Reynolds*, Mood. & M. 1. The registration of the notice, if a damage, is one of those things for which there is no remedy, *a damnum sine injuria*: *Broom's Legal Maxims*, 197.

D. B. Read, Q.C., and *W. Read*, for the defendant Lindsey. The act was done by an officer in the ordinary course of his duty, and it was admitted by plaintiffs' counsel that he thought he was doing what was right: *McDonald v. Georgian Bay Loan Co.*, 24 Gr. 364; *Ross v. Harvey*, 3 Gr. 649. Then, the defendant was entitled to notice of action: *Ross v. McLay*, 40 U. C. R. 87.

Robinson, Q.C., and Moss, Q.C., contra. Plaintiffs are entitled to have the notice removed. As to the defendant Shaw, it was put on registry without reasonable and probable cause, and malice may be inferred when that is the case. As far as the defendant Lindsey is concerned, he was guilty of negligence in recording the notice. It is a registrar's duty to consider whether an instrument presented to him is such a one as he is bound to enter on his books, and not blindly to register anything which is offered to him; and if he does so register, and it turns out to have been an improper one to have put on record, and damages result to any one whom it affects, he must take the consequences of his act: *Wharton on Negligence*, secs. 285, 297; *Addison, Torts* (last ed.,) 712, 713. As to damages, the defendants' arguments are inconsistent. See *Folkard*, last ed., 136; *Pater v. Baker*, 3 C. B. 831; *Story's Equity Jurisprudence*, 700, 708, 711; *Robinson and Joseph's Digest*, 1065. As to the right to remove the document from registry, see *Harkin v. Rabidon*, 7 Gr. 243; *Shaw v. Ledyard*, 12 Gr. 382.

June 30, 1883. HAGARTY, C. J.—I have examined the judgment of Mr. Justice Proudfoot.

I think it clear that the registry laws do not permit such a document as the defendants Shaw and Caston prepared to be recorded. In the sense of "affecting" the lands I think we must hold that the instrument must have some bearing on the title, professing to convey, charge, or affect it by its own operation: that an assertion that some one else claims to have an interest, or that the registered title of some other person is defective, does not come within the statute, in the words of the 2nd sec. (R. S. O. ch. 111,) of the Act "every other instrument whereby lands or real estate may be transferred, disposed of, charged, incumbered, or affected in any wise in land or in equity," besides the specially described instruments set out in the sections.

I therefore think that the decree is right so far as it directs the removal of this document from the registry.

I do not consider that the registrar was a necessary party to this suit. The registration of this decree would be sufficient for the removal of the alleged cloud upon the title; but we have also to consider whether he is a proper party.

The learned Judge has, I think, stated too broadly the rule as to a registrar's liability. He may be liable for acts done or omitted in the execution of his office, although such act or omission did not require the allegation or proof that it was done "maliciously and without reasonable or probable cause."

He is liable for acts or omissions causing damage, although arising wholly from negligence or mistake.

As to the reference to the Master to ascertain damages, it appears to me that the evidence does not support any claim to substantial damages.

I think it impossible that any jury could arrive at the conclusion that the statements made in this document by defendants Shaw and Caston were false and made in bad faith. It seems to me that however erroneous such belief may have been, the defendants believed what they said and acted in good faith.

Before damages could be given by a jury they must be satisfied that the statements were false and made *mala fide*.

Brook v. Rawl, 4 Ex. 521, is very clear on this point. Rolfe, B., told the jury that the only question they had to consider was whether defendant had said anything untrue about the lease: that he himself could not help thinking that he intended to speak the truth, but that if he made misrepresentations the plaintiff was entitled to a verdict; and the jury found for plaintiff.

This verdict was set aside by the Court with the full concurrence of Rolfe, B. Pollock, C. B. said: "It appears that the question whether there was any *mala fides* on the part of defendant was not distinctly put to the jury." Parke, B.: "To support this action it must be shewn that the false statement is made *mala fide*, and that the special damage ensues from it."

Alderson B., concurred.

The same principle may be deduced from *Pater v. Baker*, 3 C. B. 868, cited by my brother Proudfoot in his judgment.

Steward v. Young. 5 C. P. 122, quoting *Pitt v. Donovan*, 1 M. & S. 639. See also *Wren v. Weild*, L. R. 4 Q. B. at p. 735, per Blackburn, J.: "No action can lie for giving such preliminary warning, unless either it can be shewn that the threat was made *mala fide*, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful."

See *Merrill v. Cousins*, 26 U. C. R. 49. To the same effect are the text writers: *Starkie* on Slander, 168; *Folkard*, 131.

The alleged slander here is in the assertion that he claims certain lands or an interest therein, and that upon the demise of his father, a lunatic, proceedings would be instituted to assert his title.

It is not necessary to review the lamentable train of circumstances which have given rise to this case. Sufficient is, I think, disclosed in the evidence to satisfy our minds that no case of *mala fides* is made out against these defendants in publishing this notice. I think it was made with the intention of acting upon it and not maliciously to injure the plaintiffs. The fact that since the argument application has been made, although unsuccessfully, to the Privy Council to re-open the whole case as to the unfortunate lunatic's property, goes far to rebut all idea that no mere idle and malicious threat was made.

I think the plaintiffs are entitled to the order to remove this document from the registry, but do not think it a case for any reference as to damages, and that part of the judgment cannot be supported.

It is hardly worth considering whether nominal damages should or should not be entered for the improper registration. Perhaps it is more correct to allow \$1 damages.

Proudfoot, J., has dismissed the bill as against the registrar and directed the plaintiffs to pay his costs. I am

reluctant to interfere in a matter merely as to costs, but I am compelled to review this decision. It appears to me that the plaintiffs had the right to make the registrar a party, although they were not bound so to do. They complain of a wrong being done and prove its being done by the three defendants. The law seems clear that all concerned in the commission of an actionable wrong may be proceeded against as principals. I may refer to such cases as *Cranch v. White*, 1 Bing. N. C. 414; *Davies v. Vernon*, 6 Q. B. 448; *Broom on Parties*, 258.

I have no doubt as to the registrar having acted in good faith to the best of his judgment. He erroneously, as we hold, placed this document on the records, and it seems to me that we cannot deny the plaintiffs' right to proceed against him as well as the other defendants. We treat it as a wrong done to plaintiffs in placing an improper document on record against this property; and all concerned in placing it there may be treated as principals. In this view I do not see how plaintiffs can be directed to pay the registrar's costs, though we should not interfere with the learned Judge's discretion in refusing to give costs against him.

The Courts of late years look with disapproval on making parties unnecessarily. I refer to *Matthias v. Yetts*, 46 L. T. N.S. 502, per Jessell, M. R., and to Lord Selborne's judgment therein cited.

For the improperly placing this document on the registry I think the plaintiffs are entitled to our judgment for its removal, and that it is in itself a wrong done to them, and that the registrar and the other two defendants are responsible therefor.

I do not think any damages beyond nominal should be recovered.

I assent to the learned Judge's view as to refusing costs to plaintiffs against the registrar, but not to make them pay his costs.

I think they must have their costs against the other two defendants.

ARMOUR, J.—Two actions are combined in this suit; one for a removal from the register of an instrument wrongly placed there, and the other for the injury caused by such instrument having been wrongly placed there, and I will deal with them in their order.

It is quite clear that the registry law did not warrant the placing of such an instrument as the one in question upon the register, and it was therefore wrongly placed there, and I think this action well lies for its removal as and being a cloud upon the plaintiffs' title to their land.

I think all the defendants were properly made parties to this action. If the registrar wrongly obliterates from the register a part of my title to a lot of land, surely an action will lie against him for the removal of the cloud he has thus placed upon my title, and for a proper declaration which will supply the place of the obliteration. If others assist him in doing a like wrong, or he assists others in doing it, surely the action will lie against all of them; they are all equally wrong-doers. If the registrar, of his own motion, wrongly places something upon the register against my title to a lot of land which he has no right to place there, surely an action will lie against him for the cloud he has thus placed upon my title, and for a proper declaration doing away with the effect of such wrongful act. If others assist him in doing a like wrong, or if he assist others in doing it, surely the action will lie against them all, they are all equally wrong-doers. The defendants were all equally wrong-doers in placing the instrument in question upon the register, and were all therefore properly made defendants to this action for its removal.

An Act to protect Justices of the Peace and other officers from vexatious actions, by the 20th section thereof, is made to apply, so far as applicable, for the protection of every officer and person mentioned in the first section thereof (of whom it may be conceded the registrar is one) for anything done in the execution of his office as therein expressed; but it obviously has no application to a registrar in an action such as this. See *Folger v. Minton*, 10 U. C. R.

423; *Kennedy v. Hall*, 7 C. P. 218; *Applegarth v. Graham*, 7 C. P. 171; *Lewis v. Teale*, 32 U. C. R. 108, and cases there cited.

Then as to the action for the injury caused to the plaintiffs by such instrument having been wrongly placed upon the register. I think the plaintiffs are entitled to recover in this action against the defendants. I do not put this action on the ground that the instrument in question contained a slander of title technically so known, but on the ground that the placing of this instrument upon the register was an actionable wrong to the plaintiffs for which they are entitled to recover from the defendants the damages which they have sustained, and which naturally flowed from that wrong.

If "An Act to protect Justices of the Peace and others from vexatious actions" is applicable to this registrar in doing the act complained of, notice was duly served upon him, under the provisions of this Act, of the plaintiffs' intention to bring this action, and I do not think the plaintiffs were bound to proceed against him under the first section of this Act, because the act done by him was one which he had no authority to do, and one, therefore, for the doing of which he could be proceeded against under the second section of this Act.

I am of opinion, therefore, that the decree should be against all the defendants, with costs, and should be varied accordingly.

I think also that the declaration contained in the decree, so far as it relates to the lunatic George Shaw, should be struck out, as he was no party to this record.

CAMERON, J.—I am of opinion the plaintiff's action should be dismissed against all the defendants, and that on the facts presented by the pleadings and evidence there is no legal or equitable ground for sustaining any of the causes of action set forth in the plaintiffs' statement of claim. They are not entitled to have the assistance of the Court in removing the alleged cloud upon the title, because

the document sought to be removed does not constitute such a cloud as will warrant the Court under the practice of a Court of Equity in interfering. It is not an instrument that affects or can affect the title. It does not profess to deal with any interest, it merely asserts a claim and an intention at some future time to assert such claim in a Court of Justice. If it does affect the title in a legal sense, it is properly registered; if it does not affect the title it is not a cloud upon it. If the defendant Shaw had made a conveyance of the land to some third party, though he had no title, it would constitute a cloud upon the title, because he might have derived title from some one who had it, and it would only be the registration of such link that would be required to shew a registered title in him. If he had not such link the conveyance from him would be removable under the authorities to be found in our own reports. Such was the case of *Dynes v. Bales*, 25 Gr. 593.

In it the learned Chancellor, now Chief Justice of Ontario, reviews several of the authorities, and among others the decision of Esten, V. C., in *Hurd v. Billington*, 6 Gr. 145, wherein that learned Vice-Chancellor said: "It is understood to be the practice of the Court not to decree the destruction of instruments, as forming a cloud upon the title, where they are void upon the face of them."

In that case a conveyance had been executed under a power of attorney which did not authorize such execution, and the learned Vice-Chancellor held, as it was necessary to shew the power of attorney to support the deed, and when produced the deed would appear to be void, there was no ground for invoking the assistance of the Court of Equity to remove that which was a void deed.

The learned Chancellor, after quoting the above language of the Vice-Chancellor, proceeded, "The Court thus holding that a deed which and the execution of which will be seen upon investigation to be void, stands upon the footing of a deed void upon the face of it," and finds no fault with the assumed position that the Court will not interfere to remove a deed so void upon its face. Again in the same

case, at page 597, he said : " In later cases the Court has been more disposed than in *Hurd v. Billington* to regard an adverse and unwarrantable registration as a cloud upon title," and refers to *Harkin v. Rabidon*, 7 Gr. 243, and the following language of Blake, C., there used : " In this country the registry office is practically the root of every man's title. Now what do we find here ? The plaintiffs title has not been registered, but a conveyance from Thibadeau, the patentee of the Crown, to Rabidon has been placed upon record. Now would this Court have refused to decree the cancellation of that deed, even though it had been established that the plaintiffs would prevail at law and that Rabidon had acted in good faith ? Would it have been a reasonable answer to such bill, that the plaintiffs could defend themselves at law ? Would not the plaintiffs have had a right to say, " True, we can defend ourselves at law, but we have a right to come into equity for relief, which we cannot have at law—we ask to have the deed cancelled for the purpose of being placed beyond the reach of those dangers and annoyances, which the improper use of it would at any moment entail, and for the further and more material purpose of having that removed which forms not only a cloud upon our title, but in effect an incumbrance, detracting as it does most materially from the market value of the property."

The language so used was quite applicable to the circumstances of the case then under judgment, but has no application to the facts of the present case, and does not invade or weaken the rule of law with regard to void instruments, and the language of Vice-Chancellor Strong, now Mr. Justice Strong, of the Supreme Court of the Dominion, in *Truesdell v. Cook*, 18 Gr. 534, also quoted by the learned Chancellor in *Dynes v. Bales*, does not impeach the soundness of the rule stated by Vice-Chancellor Esten : it rather supports the view I have taken with regard to the document now in question. The mere existence of that which may be a cloud upon title does not warrant its removal in his opinion. He said : " I find no authority for

saying that the existence of an unregistered deed passing no interest, and not appearing to be a link in the title, can give ground for the jurisdiction, but the registration has such a tendency to embarrass the title of the true owner that there would be great want of remedy if this Court could not decree cancellation in such a case."

The learned Chancellor treated this opinion as a dictum merely, but thought it placed the title to relief upon the true ground. These decisions do not carry the relief beyond the point where the cloud is caused by an instrument sufficient by its own force, if there had been foundation for it, to convey or encumber the land or some interest therein. In the present case the instrument bears the light with it that makes the cloud transparent and shews there is no present title asserted, but merely a claim that may or may not be asserted hereafter, in respect of circumstances that every one who seeks to examine the title will become acquainted with, because they are interwoven in the plaintiffs' chain of title traced through proceedings in Chancery, and not based on circumstances outside of such chain of title. See further upon this point *Simpson v. Lord Howden*, 3 M. & Cr. 97; *Van Doren v. The Mayor of New York*, 9 Paige 388, in which the principle of relief from void documents is discussed.

If the defendant Shaw is estopped by these proceedings, there is an end of all claim on his part. If he is not so estopped, his assertion of his right cannot constitute a wrong, though he may fail to establish it, and his assertion of it in the manner he has done is of no more force than his assertion of it at the street corners. I think the instrument is not one that affects the title to land, within the meaning of the registry laws, and that the registrar might well have refused to register it; but having acted in good faith, and in the belief that he was acting within the scope of his duty, he was not a necessary or proper party to this action, and it was properly dismissed by the learned Vice-Chancellor as against him, with costs. I think it should have also been dismissed against the defendant

Caston, with costs, as he was not a proper or necessary party. No one who reads the pleadings and evidence can come to any other conclusion than that he was acting purely in his professional character, advising his client Shaw to the best of his ability, and supported in his advice by the opinion of counsel. Therefore, putting his liability on the most favourable ground for the plaintiffs, it would rest on no higher ground than that contained in the rule, that an agent who commits a tort by command of his principal is equally responsible with the principal; and that rule, in the absence of fraud, does not entitle the plaintiffs in such a proceeding as this, to remove a cloud from the title to land, to make him a party : *Marshall v. Sladden*, 7 Hare 428; *Mathias v. Yetts*, 46 L. T. N. S. 502. This is a ground entitling him to succeed, that is, in addition to the general ground, the instrument is of no force, and so not removable. The registry office is a public office in which the public at large are interested, and not merely the persons for the time being who have title to lands registered therein, and the persons who have title to lands so registered have no right or property in the records of the office that enables them to complain of the way in which such records are kept, unless thereby loss and injury occur to them, and they have no special right to complain of the registration of any document which, by its own force, does not interfere with their title, though it may not come within the class of documents that the law requires to be registered.

I fully concede that it would be most unfortunate if all sorts of documents and notices were permitted to be registered, and that a registrar would be guilty of grave dereliction of his public duty who permitted anything of the kind; but unless his so doing works both injury and damage to a private person, his misconduct must be dealt with by the appointing power, and not through the Courts at the instance of a private individual.

This brings me to the consideration of the further question presented by the case--is what the defendants have done

an actionable slander of title ? I am of opinion it clearly is not, upon the authority of adjudged cases. There cannot be an actionable slander of title in the *bonâ fide* assertion of a right. To constitute actionable slander of title there must be malice, which is repelled by the existence of a *bonâ fide* belief in the truth of the alleged slander, coupled with an interest, real or supposed, in the writer or speaker, in the property in respect of which the slander is uttered. *Steward v. Young*, L. R. 4 C. P. 122, and authorities there cited and considered, shew this.

The *bona fides* and absence of malice in this case on the part of the defendants are beyond question. The plaintiffs' action should therefore be altogether dismissed, and with costs, except as to the defendant Shaw, who by the course he took—a course not properly open to him of asserting his right—has invited and induced the proceeding that has been taken, and not without fair ground to believe that in law the plaintiffs had a right to succeed. I think, therefore, as to him the action should be dismissed, without costs. The decree of the learned Vice-Chancellor should stand as to the defendant Lindsey, and should be varied by dismissing the action as to the other defendants as well.

Judgment against defendants for nominal damages, without costs, as against defendant Lindsey : with costs, as against the other defendants.

[COMMON PLEAS DIVISION.]

IN RE STANTON AND THE BOARD OF AUDIT, OF THE
COUNTY OF ELGIN.

County Attorney—Fees—Disallowance by Provincial Treasurer and Board of Audit—Mandamus.

Under an Order in Council the County Attorney is entitled to \$4 on receiving and examining all informations, &c., connected with criminal charges for the Court of Assize, &c., upon the certificate of the Crown counsel that such fee should be allowed.

One C. on being brought before the County Judge on twenty-five charges of larceny, having elected to be tried by a jury, was tried at the ensuing Assizes and convicted on three of them; but the remaining twenty-two cases were not tried. The plaintiff, a county attorney, obtained the Crown counsel's certificate for and charged a fee of \$4 in each of the above twenty-five cases, which was passed by the Board of Audit, and paid by the County Treasurer, but upon the twenty-two untried cases being disallowed by the Provincial Treasurer and his decision communicated to the Board of Audit, they deducted the amount from a subsequent account.

Held, that a mandamus would not lie to the Board of Audit to rescind their order, the ruling of the Provincial Treasurer being a good reason for their deducting the amount, which was a matter for their discretion under the R. S. O. ch. 85.

A fee of fifty cents is allowed to the County Attorney for attendance in the County Judge's Criminal Courts, and making the necessary entries for each prisoner not consenting to be tried summararily. The plaintiff charged fifty cents for actual attendances and making the necessary entries in each of the twenty-five charges preferred against C., which were separately read over to him and his election taken thereon. The three cases on which the prisoner was actually tried were only allowed by the Board of Audit, on the ruling of the Provincial Treasurer.

Held, that for the same reasons as above a mandamus would not lie to the Board of Audit to allow the fee in the other cases.

The plaintiff claimed \$1 for an affidavit verifying the jurors' book, and \$1 for a certificate drawn up by him for the County Judge to sign, of the receipt of such books, &c. The tariff allows \$1 "for each certificate required to be entered in the jurors' book to verify the same."

Held, that these fees could not be allowed, and that a mandamus would not lie.

Remarks as to the unnecessary introduction of personal charges and assertions of motives in resisting the application, and costs refused in dismissing it.

THIS was an application by Mr. Stanton, the Clerk of the Peace, and County Attorney for the county of Elgin, for a writ of mandamus, directing the board of audit for that county to rescind their orders disallowing certain items to said Stanton.

The facts were as follows : As to the chief item, of \$88. A man named Chapman was charged before the Police Magistrate with a number of larcenies, and he was committed for trial on twenty-five separate charges. He was brought up before the county Judge at the one time on all these charges, and elected to be tried by a jury at the ensuing assizes. He was tried and committed on three of the charges, the others not being tried.

Under an order in council, 31st May, 1861, the County Attorney is entitled to: "Fee on receiving and examining all informations and other documents and papers connected with criminal charges, for the Court of Assize and General Gaol Delivery, upon the certificate of the counsel of the Crown at the trial, that such fee should be allowed."

In case of felony—\$4.

The Crown counsel at the Assizes gave the required certificate in each case.

The County Attorney claimed this \$4 in each of the twenty-five cases, and included it in an account presented to the board of audit in April, 1882. It was passed by the board and paid by the county treasurer.

The Provincial Treasurer refused to allow more than the fees for three out of the twenty-five cases against Chapman, thus disallowing twenty-two cases at \$4 each, in all \$88.

His decision was communicated to the Board of Audit, and they deducted the \$88 from the County Attorney's subsequent account.

The additional facts so far as material are set out in the judgment.

On April 13, 1883, the case was argued.

John Bain and *Raines* (of St. Thomas) for the Board of Audit.

J. G. Scott, Q.C., for the Attorney-General.

Read, Q. C., for the applicant.

April 27, 1883. HAGARTY, C. J.—It was conceded that these fees, under R. S. O. ch. 85, sec. 1, were to be paid in the first instance out of the county funds, and the county paying the fees were entitled to be reimbursed out of the consolidated revenue fund, being properly chargeable on such fund.

The accounts have to be audited by the board of audit, and the treasurer of the county pays them when audited and allowed : secs. 7, 12.

Sec. 11 declares that the board shall have power to direct the treasurer to defer payment of any accounts, or any items in any of the said accounts connected with criminal justice, payable out of the consolidated fund of which they may have doubt, either as to the liability of the Province or the correctness of the amount charged, until the decision of the Provincial Treasurer as to the correctness or allowance of the said items has been notified to the county treasurer.

Sec. 10 declares that the county treasurer shall furnish the board of audit with a copy of the items disallowed by the provincial treasurer, and the board shall have power in their discretion to deduct the amounts so disallowed from the next or any accounts of the same officers submitted for audit.

It appears that the provincial treasurer refused to allow more than the fees for three out of the twenty-five cases against Chapman, thus disallowing twenty-two cases at four dollars each, \$88.

This decision was communicated to the board and they under the power in their discretion deducted the \$88 from the County Attorney's subsequent account.

The board of audit seems to have acted at all events within the letter of the statute. The disallowance by the provincial treasurer seems beyond question to be a good reason for them to deduct the amount from the subsequent account. Their doing so or not, seems by sec. 10 to be left to their discretion, and they have chosen to exercise that discretion adversely to the applicant.

I do not see, therefore, how a mandamus can be properly awarded as asked.

I am not called upon on this application to review the provincial treasurer's decision. The disallowance seems to warrant the action of the board of audit.

The next item is as to \$11.

R. S. O. ch. 86, at page 907, provides in the tariff for the clerk of the peace, number 38, under the head of "Services in County Judge's Criminal Court." "Attending and service in Court, and making all necessary entries for each prisoner brought before the Judge, and not consenting to be tried." Tariff item 81, in R. S. O. ch. 84, p. 897, where the same words are repeated, fifty cents.

In the Chapman case the twenty-five charges were brought with the prisoner before the County Judge's Criminal Court, and each charge was separately read over to the prisoner, and on each he was asked how he elected to be tried—the County Attorney attending and making the necessary entries. He claimed fifty cents on each charge and so rendered his account, \$12.50.

The board of audit refused to allow more than three fees of fifty cents each, thus disallowing \$11, and declaring (as the applicant swears) that it should be referred to and claimed from the Government, and that if they got it from the Government, then the amount should be paid as claimed.

At a final meeting in February last, it was disallowed by the board absolutely, on the ground that they had not received the amount from the Government.

An affidavit is filed by Mr. Totten, to the effect that the Provincial Treasurer had disallowed this \$11, as also the \$88, and the county treasurer duly notified thereof.

In the minute of disallowance it is stated: "If the county attorney claims more, he must submit his claims to the department of the honourable the Attorney-General." This fee is also admitted to be ultimately payable out of the consolidated fund.

The observations already made as to the \$88 apply equally to the \$11, and the result must be the same.

The applicant also claims "the sum of \$2 for entering

in the jurors' book for 1883, and in the duplicate thereof, as was customary, the certification of the correctness thereof, required by R. S. O. ch. 48, sec. 38, and sub-secs. thereof, the said charges being authorized by the said Act, sec. 156, sub-sec. 8.

His affidavit states that the fee of \$1 for said certification on the jurors' book for the then current year, and the same fee for the same certification in the duplicate jurors' book, have invariably been charged.

The tariff to the Act, at p. 576, says: "7. For each copy of the jurors' book required by the Act per one hundred names, \$2. 8. For each certificate required to be entered in the jurors' book to verify same, \$1."

The tariff does not provide for any affidavits."

I find in the account of the applicant annexed to the affidavit of the chairman of the board :

(Item 7) for six Certificates to verify Jurors' Book . . \$6 00

(Item 8) " " " Duplicate Book 6 00

Opposite each item \$1 is taxed off.

I presume these must be the amounts now claimed.

The chairman states that the County Attorney claimed to get one dollar on his affidavit under sec. 38, which he calls a certificate, and also one dollar for a certificate which he drew up for the County Judge to sign, and which is not his certificate but the Judge's certificate.

Under sec. 38, the Clerk of the Peace is to deliver to the Judge presiding in open Court the jurors' book, &c., and make oath in open Court that he has carefully compared it, &c., and that it is a true and correct transcript, &c.

Sec. 43. The Judge presiding shall thereupon certify under hand and seal in such books respectively the receipt of such books, and the oath on which the same have been received, and a remembrance of the same shall, by the proper officer, be made in the minutes of the Court.

This has here been done.

If the applicant claims the \$1 fee on this certificate of the Judge because he prepared it, I incline to think he cannot claim it under the Act as his certificate for which he is entitled to a fee. He is not directed to prepare it.

As to the oath made in open Court under sec. 38, the Act does not expressly provide that it must be made in writing, and an oath orally made with proper certificate from the Judge would apparently be sufficient. It is very probable that it was intended to be in the shape of an affidavit, as under sec. 42, an affidavit is spoken of to meet certain contingencies under sec. 41. Of course a fee cannot be allowed by implication, and unless this oath can be held to be a certificate, I hardly see how it can be claimed.

It is perhaps more convenient to have this oath in writing, as it is here, and it practically amounts to a certificate of alleged facts and, it would not require much liberality in taxing an officer's charges to consider it as such.

But it seems to me that I am bound to refuse to compel its being so regarded.

If I rightly understand the last affidavit fyled by the applicant he seems to admit that these are the two alleged certificates which he claims to be allowed. He says the county has also been recouped by the Government for these charges.

I understand it to be conceded by the counsel that these charges for certificates are not chargeable against the consolidated fund.

In any event I do not think that on the materials before me I can make any order as to the \$2 item.

I regret, more strongly than I care to express, that when a purely legal question has to be discussed, such as whether an official is or is not entitled by law to a particular fee or charge, the parties resisting it should deem it proper to indulge in harsh language as to the motives of the applicant, or to make comments wholly uncalled for in the discussion of a legal claim.

If the charge be warranted by law it must be allowed, if not so warranted it has to be rejected, and motives have nothing to do with the case. The introduction of personal charges in no way helps the decision, and makes the discussion and the consideration of the case unnecessarily unpleasant.

To do the learned counsel who argued this case justice, they avoided all reference to the irrelevant and unseemly statements in the affidavits, but I of course had to read them.

I dismiss the application, but without costs. The manner in which the application has been resisted would, even if there were no other cause, prevent my giving them.

The applicant is of course still at liberty, as suggested in Mr. Totten's affidavit, to submit his case to the consideration of the Attorney-General.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

LEADER V. THE NORTHERN RAILWAY COMPANY ET AL.

Railways—Carriage of goods—Right to warehouse.

The plaintiff, who lived at Meaford, sold a quantity of barley by sample to one D, a brewer in Toronto, and shipped same by the defendants' railway, consigned to D at Brock street, signing a consignment note and receiving a shipping receipt from the company, which stipulated such receipt should not be transferable, but that as to grain consigned to defendants' elevator at Toronto defendants would grant a negotiable receipt, and was subject to certain conditions, set out below. The barley was duly carried to Toronto and warehoused by defendants in their elevator there, under, as they contended, the right conferred therefor by the conditions; and they then tendered grain of the same grade as plaintiff's, which D refused to accept.

Held, that the consignment note and shipping receipt, which constituted the contract between the parties, shewed that a distinction was made between grain consigned to the defendants' elevator and other grain; the conditions as to warehousing, set out below, being only applicable to the former, and that the plaintiff was therefore entitled to recover the damages sustained by the non-delivery of the specific grain shipped.

STATEMENT OF CLAIM.

1. The plaintiff, who is a farmer residing in the township of Saint Vincent, in the county of Grey, agreed with one Robert Davies to sell him a car load of barley, according to a sample of barley which he supplied Davies.

2. In order to carry out his agreement for the sale of the barley, the plaintiff, on the 20th day of November, 1882, delivered at Meaford to the defendants, who are carriers of goods for hire, one car load of barley, in car number 2,252 of the defendants, containing about 550 bushels, consigned to said Robert Davies, to be by them safely and carefully carried for hire for the plaintiff from Meaford to Brock street freight shed, Toronto, and there delivered to the said Davies.

3. The defendants then received the barley on the terms and for the purposes aforesaid.

4. A reasonable time for the carriage and delivery to the plaintiff's consignee, Robert Davis, has elapsed.

5. The defendants have not delivered the car load of barley, or any part of the same, to the plaintiff's consignee, Robert Davies, or to the plaintiff, at Brock street shed, or at all.

6. The plaintiff has, by reason of the premises, been deprived of and lost the car load of barley, and the profits he would have realized from the sale thereof to the said Davies.

7. Trover.

STATEMENT OF DEFENCE.

1. The defendants received from the plaintiff, at their station in Meaford, on the 20th November, 1882, 500 bushels of barley, under a special contract in writing in the following terms, viz.: (setting out the grain consignment note and the third condition on the back thereof, set out below).

2. Upon the arrival of the barley at the Brock street station, the consignee, R. Davies, was notified thereof and paid the charges thereon, and the defendants deposited the same, under the terms of the third condition of their contract, in one of their elevator bins.

3. The barley, before being so deposited, was inspected by the Government grain inspector and classified as No. 3 in his certificate, and upon said certificate the barley was placed in the proper bin for that grade of grain.

4. The defendants have duly performed their part of the said contract, and have always been and are ready and willing to deliver to the consignee the barley, according to the terms of the contract.

5. The defendants submit that the plaintiff has no property in the barley, but that the same has passed to the consignee, and that the plaintiff has no right of action against the defendants in respect of the same.

REPLICATION.

1. Issue.

2. The plaintiff further says, that the grain was not consigned to the defendants' elevator at Toronto, but, on the contrary, to Brock street freight shed station, as will fully appear on reference to the defendants' shipping receipt (setting out the same in full, as also the conditions on the back thereof, set out below.)

The cause was tried before Galt, J., and a jury, at Owen Sound, at the Spring Assizes of 1883.

The facts appeared to be that the plaintiff had agreed with one Davies, a brewer, residing in Toronto, for the sale to him of a quantity of barley by sample, at 65 cents per bushel. The plaintiff was to pay the freight and cartage, and Davies was to get the barley at one of the local switches on George street.

The plaintiff signed a "a grain consignment note," in the following terms :

" Meaford Station, Nov. 20, 1882.

" The Northern and North-Western Railway Companies will please receive the undermentioned property, loaded in bulk in car No. 2252, addressed to Robert Davies, Brock street station, Toronto, to be sent to ————, subject to their tariff, and under the conditions and contract stated on the other side."

The following " grain shipping receipt," was at the same time given to the plaintiff, by the defendants' agent, in Meaford :

“Received in bulk, loaded in car No. 2252, on and subject to the conditions mentioned on the other side (and which are on the back of the company's request to ship) from D. Leader, 500 bushels of barley, and to weigh 24,000 lbs., consigned to Robert Davies, Brock street freight sheds, Toronto. The companies will not under any circumstances recognize this as transferable, but as to grain consigned to the companies' elevator at Toronto they will grant a negotiable receipt from the said elevator when the grain shall have been received and weighed there, and the companies' freight and charges have first been paid thereon.”

The material conditions referred to in these documents are the following :

“1. The companies will not receive in bulk for transmission to their elevator at Toronto, or elsewhere, wheat or other grain being unsound or badly cleaned.

“2. No less quantity of grain in bulk than one car load will be forwarded to the elevator on the Northern and North-Western Railways.

“3. All grain will be inspected and classified by the Government grain inspector in accordance with the rules of the Toronto Corn Exchange, and will be deposited in common with other grain of the same grade in the elevator bins at the discretion of the companies' agent.”

A witness who had examined the barley on the car at Meaford said that it was really a little better than ordinary 3 grade barley, but that being slightly discoloured caused its grade to be lowered.

The plaintiff said that after making the sale to Davies he went to the freight office of the Northern Railway Company in Toronto, and they agreed with him there that the barley should be sent to George street : that on his return, on going to make the shipment he asked Mr. Stirling, the companies' agent at Meaford, if he would receipt the car to George street : that he distinctly gave Stirling to understand that the barley was not to go to the elevator, explaining to him that it had been sold by sample.

This evidence was received subject to the objection that

it was not admissible for the purpose of varying the written contract between the parties, and it did not appear that the plaintiff was not, in fact, aware of the terms and contents of the shipping receipt and consignment note.

The barley arrived in Toronto on the 21st November, and a freight advice note was sent to the consignee, that car No. 2252 consigned by D. Leader, of Meaford, containing 500 bushels of barley, had arrived at the station to his address and remained at owner's risk; and further, that if goods were not removed from the cars within twenty-four hours after arrival a charge for demurrage would be made at the rate of one dollar per car per day.

On the same day the barley was inspected by the government grain inspector as No. 3 grade, and deposited in the companies' elevator in bin No. 6 containing No. 3 barley. This was done without notice to the plaintiff or to Davies, who, on subsequently informing the defendants through the telephone that he was anxious to get the barley, was told by them that there was a jam in the yard with cars just then, and that it might not be down for a day or two.

On the 29th November, the defendants sent a post card that car 2252 was at George Street, and requested him to unload that day. On sending down teams for the purpose the man in charge of the car would not allow it to be unloaded, because the car instead of being 2252 as advised was 2232. On telephoning to the defendants again they advised that it was a mistake, and that the correct car would follow. On the 5th December another post card was sent stating that car 2045 was at George street, and Davies seeing it was not the No. of the car he had bought from the plaintiff compared the contents with the sample and rejected it, because the barley contained in it was not equal to sample.

It appears that the barley in car No. 2045 had been taken from bin No. 6 of the company's elevator, and was the same quantity as had been transferred to that bin from car 2252, and the government grain inspector deposed that both were of No. 3 grade.

The jury were asked whether the agreement was the barley was not to go to the elevator, but was to be taken to the George street switch.

They found that the defendants agreed to deliver the barley at the latter place, and assessed the damages at \$359, for which sum the learned Judge directed judgment to be entered for the plaintiff.

At the Easter sittings of the Divisional Court *G. D'Arcy Boulton*, Q. C., obtained an order *nisi* to set aside the judgment entered for the plaintiff, and for a new trial, or to enter a verdict for the defendants.

During the same sittings, June 5, 1883, *G. D'Arcy Boulton*, Q. C., supported the order. The contract as set out in the statement of claim is a contract to deliver at the Brock street station, and is in accordance with the written contract. At the trial evidence was admitted of a totally distinct contract, namely, a contract to deliver at the George street switch. This was clearly inadmissible, as being an admission of parol evidence to vary the written contract. At all events the parol evidence does not disclose a contract with the defendants. The plaintiff says that he had a conversation with some clerks in the office. He does not shew that they had any authority to bind the defendants. Under the conditions the defendants were entitled to warehouse the barley, and therefore the contract was complied with when they offered the plaintiff grain from the warehouse of the same grade as the plaintiff delivered to them for carriage: *Fitzgerald v. Grand Trunk R. W. Co.*, 28 C. P. 587, 4 App. 601, 5 Sup. Ct. R. 204; *Watkins v. Rymill*, 10 Q. B. D. 178, 187.

Creasor, Q. C., contra. The circumstances under which the barley in question was delivered to the defendants disposes of the objection as to admission of parol evidence. The plaintiff sold the barley to Davies by sample at five cents above the market price, but only if he could arrange with the defendants to have it delivered at the George street switch. The plaintiff then went to the defendants' head

office and explained to them the sale he had made, and it was arranged that the grain should be delivered at the switch; but as defendants' agent at Meaford could only give a shipping receipt for the Brock street station, the receipt was so drawn up, but plaintiff was informed that the grain would be forwarded to the switch. The plaintiff expressly told defendants that the grain was not to go into the elevator. The parol evidence did not vary the written contract, but shewed that it did not contain the whole contract. The written contract was for the carriage to Brock street station, and the parol evidence shews that there was a further contract to carry to the George street switch, and the conditions as to warehousing only apply to grain which is consigned to the elevator: *Malpas v. London and South Western R. W. Co.*, L. R. 1 C. P. 335. The plaintiff therefore was entitled to receive the specific grain delivered to the defendants. Assuming therefore that the contract would be complied with by a delivery at the Brock street station there never was any delivery there, or any delivery at all of the specific grain.

June 29, 1883. OSLER, J.—The breach of contract alleged in the statement of claim is not that the defendants did not deliver the barley at the George street switch, but that they did not deliver it to Davies or the plaintiff at the Brock street freight sheds, or at all.

The question is, not whether the real agreement was for a delivery at the George street switch, which the defendants were evidently willing to make, instead of at the Brock street freight sheds, but whether they had the right to deposit the plaintiff's grain in their elevator with other grain of the same grade, and then to deliver to him or his consignee any grain of that grade in satisfaction of their undertaking.

I am of opinion that the plaintiff is entitled to recover, on the short ground that the conditions on which the defendants rely are applicable only to grain which is consigned to their elevator. The consignment note and shipping

receipt must be read together, and they, with the conditions endorsed, constitute the contract between the parties. Then we see by the terms of the shipping receipt that the company distinguish between grain consigned to their elevators and grain not so consigned, by undertaking as to the former to give the shipper a negotiable receipt therefor from the elevator when it has been received and weighed there. Therefore, and because also of the right, under the third condition, to mix the grain with other grain of the same grade, it is necessary to provide, as the first condition does provide, that the company will not receive for transmission to their elevators wheat, &c., which is unsound or badly cleaned.

In terms, the third condition, which provides for the inspection of all grain by the grain inspector, would include grain carried in bags. The evidence, however, is, that the company do not treat it as applying to anything but grain forwarded in bulk. So also, it would in terms include grain consigned to intermediate stations where there is no elevator, and thus authorize the company to carry it forward and deposit it wherever there might happen to be one, and have it inspected and classified by the government inspector. That, however, is evidently not the meaning of the condition.

When grain is consigned to the elevator, and there may, therefore, be difficulty in finding separate accommodation for each consignment, it is convenient that it should be classified or graded, and that all of the same grade should be deposited together. But where the grain has been already sold, and possibly, as in the present case, by sample, and is conveyed direct to the purchaser, and the shipper, therefore, needs no negotiable receipt, why should it be placed in the elevator when it has not been consigned there? It is only as to grain so consigned that, by the terms of shipping receipt, a negotiable receipt will be granted.

I think the order *nisi* should be discharged, with costs.

WILSON, C. J., and GALT, J., concurred.

Order discharged.

[COMMON PLEAS DIVISION.]

HANNS V. JOHNSTON.

Division Courts Act, R. S. O. ch. 47, sec. 231—Notice of action—Personal service—Computation of time.

Sec. 231 of the Division Courts Act, R. S. O. ch. 47, enacts that any action or prosecution against any person for any thing done in pursuance of the Act shall be commenced within six months after the fact was committed, &c., and notice in writing of such, action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

Held, (1) that personal service was not required, but that service on the wife at the defendant's residence was sufficient; (2) that the Court in which the action is to be brought need not be stated in the notice; but even if required, *semble*, that that the statement in the notice that the action would be brought in the High Court of Justice, without naming the particular Division, was sufficient; (3) that in computing the time in which the action must be brought the day on which the fact was committed must be excluded, so that an action commenced on the 5th June, for an act committed on the 5th December, was in time.

THIS was an action of trespass to goods, which the defendant had seized under a warrant of attachment directed to him as bailiff of the eighth Division Court of the County of Wellington.

The action was tried before Galt, J., and a jury, at Orangeville, at the Spring Assizes of 1883.

The trespass complained of was committed on the 5th December, 1881, and the action was commenced on the 5th June, 1882.

The notice of action stated that a writ would be sued out of the High Court of Justice. It was delivered to the wife of the defendant at his dwelling house for him, he being absent at the time on a visit to Manitoba.

It was objected that the notice of action was insufficient, on the grounds that it should have been served on the defendant personally, and that service on the wife was not sufficient: that it was not sufficient to state that the writ would be sued out of the High Court of Justice, but that the particular Division in which it was intended to be brought should be stated; and also that the action had been brought too late.

The learned Judge reserved judgment, and afterwards directed judgment to be entered for the plaintiff.

During the Easter sittings, *Osler*, Q.C., moved on notice to set aside the judgment for the plaintiff and to enter judgment for the defendant.

During the same sittings, June 6, 1883, *Osler*, Q.C., supported the motion. The first question is as to the service. Section 231 of the Division Courts Act, R. S. O. ch. 47, requires the notice to be given to the defendant. This means personal service, and the service on the wife was insufficient. Where personal service is not required it is expressly so enacted, as is done in sec. 126. Under that particular section service of the demand of perusal and copy of the warrant may be effected by leaving it at the bailiff's residence. Under section 10 of R. S. O., ch. 73, the Act for the protection of Justices of the Peace and other officers from vexatious actions, the notice may be delivered to the defendant, or left at his usual place of abode. Section 231 not containing any such words, the inference clearly is, that the service must be personal. In any event it must be shewn that the notice came to the defendant's knowledge. The defendant notified the plaintiff that he intended putting in an affidavit that he was absent in Manitoba at the time the notice was left with his wife, and that he had no knowledge of it. Where service of a summons is required to be personal, the defendant must either be personally served or substituted service must be authorized to be made, and the greatest strictness is required: *Buck v. Hunter*, 20 U. C. R. 436; *Vaux v. Vollans*, 1 N. & M. 307; *Moore v. Gidley*, 32 U. C. R. 233; *Sprung v. Anderson*, 23 C. P. 152. The next question is as to the sufficiency of the notice under sec. 231. The statement in the notice that a writ would be issued in the High Court of Justice was not sufficient. The particular division should have been indicated. A writ cannot be issued in the High Court under such

heading alone, but some particular division must be selected, and the defendant is entitled to know what division the action will be brought in. This was the practice before the Judicature Act, and that Act has not altered the practice in this respect. Where the notice stated that the action would be commenced in the Court of Queen's Bench or Common Pleas it was held insufficient: *Bross v. Huber*, 18 U. C. R. 282; *Nevill v. Ross*, 22 C. P. 487; see also *Buck v. Hunter*, 20 U. C. R. 436. The last objection is, that the action was not commenced in time. The section requires the action to be commenced within six months after the fact was committed. Under these words both the day on which the fact was committed and the last day for bringing the action are inclusive.

Dunbar (of Guelph), contra. As to personal service none was required. Under the Division Courts Act personal service is only necessary where the Act specially requires it. This is the general practice: Arch. Prac., 13th ed., 1079. Section 231 is silent as to the mode of service, while the preceding section 226 would indicate the mode of service, namely, served on or left at the defendant's residence. No notice, however, was required here as the bailiff did not act *bonâ fide*. The notice was clearly sufficient. This was concluded by *Buck v. Hunter*, 20 U. C. R. 436, the notice was held insufficient there because the notice specified one Court, and the action was brought in another Court. But it was said if no Court at all had been specified, the notice would have been sufficient. The cases referred to by the other side are cases under the Act for the protection of Justices of the Peace, where it is expressly enacted that the Court must be stated in the notice, and have no application to the Division Courts Act: *Stephens v. Stapleton*, 40 U. C. R. 353; *McMartin v. Hurlburt*, 2 App. R. 146; *O'Brien's Division Courts Manual*, 1879, p. 222, note. Section 231 merely says that an action shall be commenced, without saying anything about the Court in which it is to be brought. Then as to comput-

ation of time. The proper construction of the statute is to exclude the day on which the act is committed.

Osler, Q. C., in reply. The case of *Edgar v. Magee*, 1 O. R. 287, contains all the cases up to the present time, and shews that the day on which the fact was committed is included. The question of *bona fides* cannot be raised as there is no finding on this point.

June 27, 1883. OSLER, J.—The objections taken to the notice of action were (1), that it should have been served upon the defendant personally, and service on the wife was insufficient, (2) that it was not sufficient to state, as this notice did, that the writ would be sued out of the High Court of Justice, but that the particular Division in which it was intended to be brought should also have been explicitly stated.

It was also contended that the action had not been brought in time, as the statute enacts that it shall be commenced “within six months after the fact was committed,” thus including the day on which the cause of action arose.

I am of opinion that the judgment appealed from is right, and that all the objections fail.

The 231st section of the Division Courts Act enacts that “any action or prosecution against any person for anything done in pursuance of this Act shall be commenced within six months after the fact was committed, and shall be laid and tried in the county where the fact was committed; and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action.”

Personal service is not in terms required by this section, but it is contended that it is so by implication, because section 226, which provides for demand of perusal and copy of the warrant under which the bailiff has acted in certain cases, permits such demand to be served upon or left at the residence of the bailiff; and because the notice of action required by the Act for the protection of Justices of the Peace from vexatious actions, R. S. O. ch. 73, may be *delivered to the*

Justice, or left for him at his usual place of abode, thus contrasting two modes of service, either of which may be adopted and will be sufficient; personal service being indicated by the expressions "served upon" in the one case, and "delivered to" in the other. No substantial reason however can be suggested why personal service should be necessary of one of these notices rather than of another and therefore I do not think we need look outside of section 231 for any aid to its construction, especially as it employs a different form of expression from that made use of in the other sections and says that notice shall be *given to* the defendant.

In *Jones dem. Griffiths v. Marsh*, 4 T. R. 464, the question was, whether the defendant had been duly served with notice to quit, which had been served on his maid-servant at his house not situated on the demised premises. Lord Kenyon said, "In every case of the service of a notice, leaving it at the dwelling house of the party has always been deemed sufficient. So wherever the Legislature has enacted, that before a party shall be affected by any Act notice shall be given to him, leaving that notice at his house is sufficient. * * In general, the difference is between process to bring the party into contempt, and a notice of this kind; the former of which only need be personally served on him." And Buller, J., says, "*Ex concessis* personal service is not necessary in all cases. * * The servant * * was not called to prove that she did not communicate the notice to her master; this was ample evidence on which the jury would have presumed that the notice reached the tenant."

In the case of the *Queen v. Justices of the North Riding of Yorkshire*, 7 Q. B. 154, notice of appeal from a conviction had been delivered by the defendant at the dwelling house of the justices, and it was objected that it should have been served on them personally. The material words of the statute were "first giving or causing to be given to such Justice * * notice in writing of his intention to bring such appeal," &c. The sessions refused to hear

the appeal, holding that the service should have been personal. On a mandamus to compel them to do so, the Court held that the service was sufficient. Wightman, J., observed that nothing was said in the Act as to the kind of service.

These cases, and many others which might be referred to, shew that the service of the notice of action on the wife of the defendant was sufficient. See also *Ward v. Vance*, 9 U. C. L. J. 214.

Then, as to the objection that the notice does not state in what Division of the High Court the action was intended to be brought; the section of the Division Courts Act is different in this respect from R. S. O. ch. 73, sec. 10, and does not require that the Court shall be mentioned in the notice.

In *Stephens v. Stapleton*, 40 U. C. R. 353, followed in *McMartin v. Hurlburt*, 2 App. R. 146, it was held that these sections were not to be read together, and that the bailiff was not entitled to the cumulative protection of both. If necessary, I should be inclined to say that the notice was sufficient under either Act.

In *Green v. Broad*, 46 L. T. N. S. 888, the latest case I have seen on the subject, the notice of action was open to this objection if it be one, but it was not taken, and in other respects it was held to be sufficient.

The last objection is, that the action was not brought in time, but clearly it was so if the day on which the fact was committed is not to be reckoned as part of the period of six months.

There is abundance of authority that the day is to be construed exclusively wherever anything is to be done in a certain time after a given event or date. The cases are collected in the recent case of *Edgar v. Magee*, 1 Ont. R. 287.

I refer to the observations of Hagarty, C. J., at p. 296.

Hardy v. Ryle, 9 B. & C. 603, is in point. There it was decided that in computing the six months in an action against a Justice of the Peace for false imprisonment,

where the imprisonment expired on the 14th December, and the writ was issued on the 14th June following, the former day was to be excluded, and that the action was, therefore, brought in time.

In my opinion the motion should be dismissed, with costs.

WILSON, C. J. and GALT, J., concurred.

Motion dismissed.

[COMMON PLEAS DIVISION.]

REGINA V. FEE.

Deputy Judge—Presumption of validity of appointment—R. S. O. ch. 42—Absence from county.

The defendant was convicted of perjury alleged to have been committed in a cause tried at a Division Court held by one H. under a commission issued by the Governor-General in Council appointing him Deputy Judge of the County Court of the county of Victoria, during pleasure and the absence of the County Judge under the leave of absence granted to him by an Order in Council.

Held, it was not necessary for the Crown to prove the Order in Council granting the leave of absence, for its existence, and that the commission was not effete by the lapse of time would be presumed, in accordance with the general presumption of law that a person acting in a public capacity was duly appointed and authorized to act, the *onus* of shewing the contrary being on the defendant.

Held, also, that the commission was validly issued under R. S. O. ch. 42, and that it was not essential to enable the Deputy Judge to act that the County Judge should be absent from the county.

Case reserved. by Wilson, C. J., at the Lindsay Assizes.

The defendant was convicted of perjury, alleged to have been committed in a cause tried at a sittings of the Fifth Division Court of the County of Victoria, held at Lindsay, on the 26th September, 1882.

The Court was presided over by Adam Hudspeth, Esq., Q.C., acting by virtue of a commission, dated 6th September, 1882, appointing him "Deputy Judge of the County Court of the County of Victoria during pleasure and the absence of his honour William Warren Dean, the Judge of the said County Court, under the leave of absence granted to him by an order of the Queen's Privy Council for Canada, approved by His Excellency the Governor-General, and bearing date the 2nd September, 1882."

At the trial it was shewn that Judge Dean was in Lindsay when the Division Court was held, but was too ill to hold the Court. The Order in Council mentioned in Mr. Hudspeth's commission was not proved.

The learned Chief Justice reserved the following question for the opinion of the Court viz., whether the said Adam Hudspeth, Esquire, as such Deputy Judge, under the

said commission, and the leave of absence therein referred to, had authority to hold the said sittings of the Division Court at which the defendant gave the evidence which was the subject of the prosecution.

During Easter sittings, May 31, 1884, the case was argued.

Osler, Q.C., for the prisoner. The appointment of Mr. Hudspeth was made under R. S. O. ch. 42, secs. 6 and 7. These sections do not apply to an appointment of this kind. The appointment should have been made by the County Judge, under sec. 20 of the Division Courts Act, R. S. O. ch. 47. The next point is that by the commission, the appointment was to act during the absence of the County Judge. The words of section 7 are that the Deputy Judge shall hold office in case of the death, illness, or unavoidable absence, or absence on leave of the Judge. Absence means absence from the county. Illness would include absence, and therefore the word absence must have been used for some purpose, and the only way to give effect to it, is to construe it as meaning absence from the county. It is agreed that the case should be amended by also submitting the question for the opinion of the Court as to whether the Order in Council should have been proved. The order clearly should have been produced and proved, in order to shew whether the time limited for absence had expired. He referred to *Sinclair's* Division Courts Acts, p. 16, *et seq.* notes; *Andrews v. Narris*, 1 Q. B. 3; *Re Liebes v. Ward* 1 Can. L. T. 48, 48 U. C. R. 375; *Re Hawkins*, 3 P. R. 239.

J. G. Scott, Q.C., contra. The appointment was properly made under R. S. O. ch. 42. Section 6 provides for the appointment of a Deputy Judge. Section 7 provides for the terms upon which he shall hold office; and there is nothing to prevent such deputy being appointed for a limited time. The absence referred to in the section does not mean absence from the county. It merely means absence from the Court. The fact of the use of the word illness

in connection with it does not necessarily convey such meaning, for a Judge may be ill and yet present and sitting, and though at the time suffering most excruciating pain. As to the production of the Order in Council, it was understood, if necessary, that the order should be put in, and the Court may look at it now, and it shews that the time had not expired. This point was in fact waived. But apart from the production of it, the Judge will be presumed to have had jurisdiction to act under the well-known rule *omnia presumuntur rite esse acta*: *Taylor* on Evidence, 7th ed., p. 159, sec. 146, p. 178, sec. 171, where the cases are collected.

Osler, Q.C., in reply. There was no consent on the part of the prisoner to the production of the Order in Council. The *maxim omnia presumuntur*, &c., does not apply here, as it does not apply so as to give jurisdiction, but only where the jurisdiction is proved, the Judge is presumed to act within the scope of his authority: *Taylor* on Evidence, 7th ed., pp. 159 and 1323; *Rex v. Inhabitants of All Saints*, 7 B. & C. 785; *Cooley* on Const. Limitations, 5th ed., p. 502, sec. 406.

June 29, 1883. OSLER, J.—It was agreed on the argument that the case should be amended by submitting the further question whether it was necessary that the Order in Council should have been proved in order to shew that the leave of absence mentioned in the commission had expired.

This objection is, I think, covered by the first question; but whether it is so or not, I am of opinion that the *onus* of proving the Order in Council, and, if the fact was so, that the commission had become effete by lapse of time, was on the defendant, in accordance with the general presumption of law, that a person acting in a public capacity was properly appointed and was duly authorized to do so. That is a presumption which is acted upon every day in the case of justices of the peace, constables, commissioners for taking affidavits, and others, and which would be acted

upon in the case of a deputation by a Judge of a barrister to act as Judge of a Division Court under section 20 of the Division Courts Act. It can make no difference that the commission in the present case is limited in point of time so long as it does not appear therefrom that the time has expired. *Primâ facie* it was sufficient to have shewn that Mr. Hudspeth was acting as a Judge without proving his commission.

The case of *Marshall v. Lamb*, 5 Q. B. 115, is very much in point, for there, as here, the appointment was a special one. A statute empowered a Master in Chancery, "acting under any appointment of the Lord Chancellor to be given for that purpose," to issue a fiat in bankruptcy. A fiat purporting to be issued by a Master, in virtue of an authority given by the Lord Chancellor, was proved to have been actually issued by a Master who had often issued similar fiats. It was held sufficient evidence of the Master's jurisdiction to issue the fiat without specific proof of any authority given him by the Lord Chancellor. Patteson, J., to counsel *arguendo*, observes at p. 122: "The case of a Baron of the Exchequer appointed by warrant under the statute to sit in equity in the chief Baron's absence, would be analogous to this. * * The same rule of evidence runs through all offices, from that of a Judge to that of a vestry clerk."

And see *Best on Evidence*, 1st Amer. ed., from 6th Eng. ed., secs. 356, 358, 360; *Broom's Legal Maxims*, 7th Amer. ed., from 5th Eng. ed., p. 944; *Doe dem. Howell v. Wilkins*, 7 B. & C. 783; *Hopley v. Young*, 8 Q. B. 63; *Smith v. Redford*, 12 Gr. 316.

It was contended that as the maxim *omnia presumuntur rite esse acta* does not apply to *give jurisdiction* to magistrates and other inferior tribunals, it was necessary to prove a valid and existing appointment. But this limitation of the maxim is not in conflict with the general presumption of law as to persons acting in an official or judicial character, and merely affirms the well-known rule that "where an inferior Court (a Court of limited jurisdiction either in

point of place or of subject matter,) assumes to proceed, its judgment must set forth such facts as shew that it has jurisdiction, and must shew also in what respect it has jurisdiction :” per Lord Brougham, in *Taylor v. Clemson*, 11 Cl. & F. 610.

Thus, in the case cited on the argument of *Rex v. Inhabitants of All Saints*, 7 B. & C. 785, where two Justices of the Peace had power under the Mutiny Acts to take the examination of a soldier quartered at the place where the examination was taken, and such an examination was tendered in evidence to prove his settlement, it was held not to be admissible, because it did not shew on the face of it that he was quartered at that place.

So in the case before us, it must have appeared at the trial that the cause in which the alleged perjury was committed was one over which the Court had jurisdiction in point of place and subject matter, the due appointment of the person who presided as Judge being presumed *donec probetur in contrarium*.

I have said more as to this objection than it probably deserves, but it was urged upon us so strongly that I have thought it well to point out that there is no merit in it.

Proceeding then to the main question, it was argued, (1) That the deputation of a Judge to hold a Division Court could only be made under the Division Courts Act, R. S. O. ch. 47, and not under the Local Courts Act, R. S. O. ch. 42. (2) That as Judge Dean was not actually absent from the county during the sittings of the Division Court in question, Mr. Hudspeth’s commission was not in force.

The following sections of the Acts referred to are material :

R. S. O. ch. 42, sec. 4, requires that every County Court Judge shall reside and shall continue to be a resident Judge in the county designated in his commission.

Sections 6 and 7 provide that a barrister of at least three years’ standing may be appointed to be a Deputy Judge for any county, and this notwithstanding that the office of the Judge is vacant, or he is ill or absent at the time of his

appointment. The Deputy Judge shall hold office during pleasure, and in case of the death, illness, or absence of the Judge, shall have authority to perform in the place of such Judge, in the county for which he is deputy, all the duties of and incident to the office of Judge of the County and Division Courts, and all acts required or allowed to be done by the Judge of the County Court under this or any other statute, *except* that he is not *ex-officio* a Justice of the Peace, and is not disabled from practising his profession.

The Division Courts Act, sec. 19, enacts, that the Division Courts shall be presided over by the County Court Judges, or Junior, or Deputy Judges, in their respective counties.

Sub-sec. 2. The Junior Judge is to preside over the Division Courts, subject to any arrangements the Judges may make between themselves.

Sec. 20. In case of the illness or absence of *the Judge*, a Judge of the County Court of any other County may hold the Court, or the first-mentioned Judge may appoint some barrister of the bar of Ontario to act as *his* deputy, and the barrister so appointed shall, as *Judge of the Division Court*, during the time of his appointment, have all the powers and privileges, and be subject to all the powers and duties vested in or imposed by law upon the Judge by whom he was appointed.

Secs. 21 and 22 provide that, "the County Judge" so appointing, or the barrister so appointed deputy, shall forthwith notify the Lieutenant-Governor of the appointment.

From these sections it appears that the Deputy Judge appointed under the first Act, who must be a barrister of a certain standing at the bar, is the Deputy Judge of the county, appointed by the Crown, invested with all the functions and powers of the County Judge, and among others with the power of holding the Division Courts of the county; while the deputy appointed under the Division Courts Act is not required to be of any special standing at

the bar, is the deputy of the Judge only and with authority limited to holding the Division Courts, or possibly only those specially named, during the time of his appointment, which cannot be for longer than a month at a time.

In *Re Liebes v. Ward*, 45 U. C. R. 375, it was held that in a county where there was a Junior Judge, such a Deputy Judge as last mentioned might be appointed by him, the word Judge, firstly mentioned in section 20, including the Junior Judge as well as the County Judge.

I should think it would also include the Deputy Judge appointed by the Crown under ch. 42, he being clearly one of the Judges who by sec. 7 of ch. 42 and sec. 19 of ch. 47, is authorized to preside over the Division Courts, although, apparently by some oversight, the 21st section of ch. 47, which requires "the County Judge so appointing" a deputy to notify the Lieutenant-Governor of any appointment made by him under section 20, was not amended when sec. 19 was amended by 40 Vic., ch. 7, sched. A (67,) by the addition of the words, "or Junior or Deputy Judge."

I therefore think that Mr. Hudspeth's commission was perfectly valid, and the only remaining question is, whether it ceased to be in force merely because of Judge Dean's continued residence in the county.

The appointment, by the terms of the commission, was "during pleasure and the absence," &c., "under the leave of absence granted," &c., by an Order of Council dated 2nd September, 1882."

I have already said that it must be presumed *primâ facie* that the leave had not expired. The argument is, that as the Judge's authority and powers continue and may be exercised by him, while he is actually present within the limits of his county, the absence mentioned in sec. 7 of ch. 42, during which the powers of the Deputy Judge are exercisable, must be an absence from the county, especially as an absence arising from illness is also contemplated by the section.

I cannot think that this is the meaning to be necessarily attached to the word. Why is it to be assumed that the

Judge must leave his county in order to accept a leave of absence? He may be too ill to travel, and the leave may have been granted because of that. Or he may be of opinion that his leave can be enjoyed to more advantage in his own county than elsewhere. As the section formerly stood the Deputy Judge was authorized to act only in case of the death, illness, or *unavoidable* absence, or absence *on leave* of the Judge. By 40 Vic. ch. 7, sched. A (57,) the latter words were struck out and the word "absence" substituted therefor. A similar change was made in the 2nd sub-sec. of sec. 6, and in ch. 47 sec. 20 the same word was substituted for "unavoidable absence," sched. A (68).

No authorities were cited to us on this point, and I have not succeeded in discovering any which afford much assistance; but looking at the legislation which has taken place on the subject, I am of opinion that whatever it may have formerly meant, the "absence" of the Judge now means absence from his official duties from any cause, whether resident in his county or not. I think the powers of the Deputy Judge then become exercisable.

The first question submitted is, therefore, answered in the affirmative, the second in the negative, and the conviction affirmed.

WILSON, C. J., and GALT, J., concurred.

Conviction affirmed.

[QUEEN'S BENCH DIVISION.]

WILBY V. STANDARD INSURANCE COMPANY.

Fire Insurance—Encumbrances—Misrepresentation—Divisible condition.

A fire policy contained a condition, in addition to the statutable conditions, to the effect that if the property were alienated, or any transfer or change of title occurred, or if it were incumbered by mortgage, without the consent of the company, or if the property should be levied upon under process of law, the policy should cease. In answer to the question whether the property was mortgaged, the assured answered "\$5,000 to F. L. & S. Co." There were at the time, in fact, two mortgages to that company, on which \$6,160 were due. After the policy a mortgage was given to secure endorsements, and was discharged, and another was given by the plaintiff to his partners who retired from the firm, but the company was not apprised of either. The jury found that the representations as to incumbrances were false, but not made fraudulently, and a verdict was entered for the defendants.

Held, that the representation as to incumbrances was a violation of the condition, and that the verdict was right.

Per HAGARTY, C. J. Though that part of the condition as to levying might be unreasonable (5 A. R. 605), the remainder was not, and the condition was divisible.

THE statement of claim set forth that defendants insured the plaintiff and George Smith, under the name of "Smith & Wilby," against loss by fire to certain machinery in their woollen factory, at Weston, in \$2,000, between 1st of May, 1878, and 1st of May, 1881: that during the currency of the policy the property was destroyed: that at the date of the policy the plaintiff and Smith were partners, and during the currency of the policy, and before the fire, Smith released his interest in the insured property to the plaintiff, who then became sole owner: that George Smith, after the fire and before action, assigned to plaintiff all his interest in the insurance moneys: that by reason of the fire the plaintiff sustained loss to the amount of \$2,000: that the plaintiff performed all conditions save those the non-performance whereof the defendants were precluded from objecting to.

The plaintiff, in his statement of claim, anticipated the defence of the property being encumbered after the issue of the policy, and sought to displace it by averring that

the policy was issued after the passing of "The Fire Insurance Policy Act," and submitted that the condition under which this defence was raised was not just and reasonable. The plaintiff also anticipated the defence of noncompliance with the conditions as to proof in the event of fire, by urging, first, that the defendants objected to the loss upon other grounds than for imperfect compliance with this condition; and, secondly, that after the objections were made the plaintiff furnished additional statements of proof of loss, and the defendants did not notify the plaintiff that these further proofs were objected to.

The defendants, in answer, pleaded that the policy was procured by fraud. They set out the second statutory condition, and averred that there was over valuation and concealment: that the plaintiff in the application misrepresented the number of the encumbrances; and they set up an additional condition, No. 5 in the added conditions, and in the following words:

"When property insured by the policy, or any part thereof, shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or in case the same is encumbered by way of mortgage or otherwise, without the consent of this company endorsed thereon, the policy shall cease to be binding on the said company." And they averred as a breach of it a mortgage subsequent to the policy to Mark Wilby.

The defendants further pleaded the fourth statutory condition, and averred as a breach of it the grant by Smith to the plaintiff of the interest of Smith in the insured property, and the mortgage made of the property.

The defendants further pleaded the third statutory condition, and insisted on the dissolution of the firm of Smith & Wilby, and the release by Smith to Wilby of Smith's interest, as a breach of the condition.

The defendants further pleaded noncompliance with the condition requiring proof in the event of loss, and that the plaintiff had been guilty of false swearing.

At the trial, which took place at the Toronto Assizes,

before Cameron, J., on 11th and 12th January, 1883, it appeared that the policy had been effected by the firm of Smith & Wilby, composed of the plaintiff and one George Smith: that on 14th February, 1880, the firm of Smith & Wilby was dissolved, and that Smith conveyed his interest in the insured property (which consisted of a large quantity of woollen machinery situated in their mills at Weston) to the plaintiff: that the plaintiff, by mortgage dated 14th February, 1880, mortgaged the insured property to George Smith, to secure the money coming to him out of the firm: that on 3rd May, 1880, the plaintiff's agent wrote the local agent in Toronto advising him of the "change in the name of the firm" from Smith & Wilby to O. Wilby & Co.; and that the secretary of the company, on 15th May, wrote back to the local agent consenting to this change: that the insured property was destroyed by fire on 30th November, 1880, the amount of the loss greatly exceeding the amount insured. It also appeared at the trial that the application for the insurance incorrectly stated the amount of the encumbrances on the buildings in which the insured goods were. This discrepancy appeared to have arisen owing to the encumbrances, which were held by the same mortgagees, being payable by instalments extending over a number of years, and the applicant being unskilled in ascertaining the present value of the mortgages. It appeared also that after the insurance was effected the plaintiff had mortgaged the property to one Mark Wilby, to secure endorsements; but that all money secured by this mortgage had been paid off before the fire: that after the fire Smith had made a formal transfer of his interest in the insurance money to the plaintiff.

The condition requiring proof in the event of loss comprised the provisions of the 13th statutory condition and some additional provisions. Among the additional provisions the insured was required to furnish the company with a statutory declaration "declaring the occupancy of the building insured, or containing the property insured, at the time of the fire, and the amount of existing incumbrances,

if any, the whole cash value and ownership of the property, and his interest therein ;” and it provided that the proofs, declarations, evidences, and examinations called for by or under the policy must be furnished to the company within thirty days after the loss; and that, upon receipt of notice and proofs of claim as aforesaid the board of directors should ascertain and determine the amount of such loss and damage, and such amount should be payable in three months after receipt by the company of such proofs. Then followed the stipulation that any untrue statement in relation to any loss, or to any of the above particulars, should vitiate any claims for loss or damage to the property insured.

After the fire the plaintiff furnished several sets of proof papers, the first in December, 1880. This was objected to as not giving the information asked for. A second set was furnished in March, 1881, but contained some incorrect statements in respect of encumbrances effected on the property since the issuing of the policy. A third set was subsequently, in July, 1881, furnished.

The questions in these proof papers and the answers thereto relied on as defences are set forth in the judgment.

The learned Judge submitted to the jury certain questions and answers, which are given in the judgment, and on these answers a verdict was entered for the defendants, with costs of suit.

It was agreed that in case a judgment should be thereafter entered for the plaintiff, the amount should be for \$2,180.

On 8th February, 1883, *W. N. Miller* obtained an order *nisi* to set aside the verdict or judgment, and to enter the judgment for the plaintiff for \$2,180, together with costs of action, or for a new trial on the following, among other grounds : (1) that the judgment directed to be entered was wrong, by reason of the Judge having caused the findings to be wrongly entered with reference to the findings of the jury upon the questions submitted to them : (2) that the

finding of the jury in answer to the question whether, after the issue of the policy sued on, there was a change material to the risk, was contrary to law and evidence and the weight of evidence: (3) that the condition upon which such finding was based should have been construed by the said learned Judge; and that the said learned Judge should have told the jury that the change of risk there contemplated was a change of a different kind from that disclosed by the evidence, and that that condition under the circumstances constituted no defence to the action: (4) that the findings of the jury on the questions submitted to them, and the entry of the judgment thereon, were contrary to law and evidence and the weight of evidence: (5) that the question whether the additional conditions were printed in ink of a different colour, and in conspicuous type, was not a question to be decided by the jury, but by the learned Judge, under the terms of "The Fire Insurance Policy Act": (6) that even if the defendants were at liberty to refer to such additional conditions, those relied on by them were unreasonable, and not binding on the plaintiff.

On 20th February, 1883, *B. B. Osler*, Q.C., shewed cause, and insisted that the evidence showed there was a change material to the risk, and that even if the changes in title mentioned in the evidence were not of the kind contemplated in the 3rd and 4th statutory conditions, they were clearly within the 5th variation: that the 5th variation, although possibly in part unreasonable, was divisible, and that part of it relating to subsequent encumbrances was reasonable: that the answer to the 3rd and 4th questions shewed that the misrepresentation in the application as to the amount of the encumbrances was a good defence, and that the false swearing, or untrue statement in the proceedings, was also a bar to plaintiff's recovery.

W.N. Miller, contra, urged that the term "changes material to the risk," when mentioned in the statutory conditions, did not include changes in title or encumbrances: that the condition making the policy void owing to the company not being notified of subsequent mortgages was the 5th va-

riation : that this variation must be treated as constituting one condition, and that if it was be so looked at it was void, owing to certain parts of it being unreasonable : *Sands v. Standard Ins. Co.*, 26 Gr. 113. S. C. 27 Gr. 167 ; *Fire Ins. Policy Act*, sec. 6 ; *May v. Standard Ins. Co.* 5 A. R. 605 ; *Gore District Mutual Ins. Co. v. Samo*, 2 S. C. 411. As to the representation in the application as to the amount of the encumbrance he pointed out that the evidence shewed that the machinery was bought after the date of the mortgages held by the Farmers Loan and Savings Company, and (1), it was nowhere shewn that the machinery was attached to the freehold or formed any part of the property mortgaged ; and (2), that even if the machinery were covered by the mortgage the evidence shewed that the misrepresentation was of a matter not material : that the evidence shewed that the incumbrance was stated to be \$5,000, while the actual value was \$6,160, and that the value of the property insured was so great that the discrepancy was not material. As to the incorrectness of the answers in the proof papers it was urged that the information in respect of which the incorrect answers were given was required, and such information, if untrue, was made to vitiate the policy by an addition to the statutory condition, which was unreasonable ; (1) because it was indivisible, and a part of it was clearly unreasonable ; and (2) because, even if it were divisible, the part of it that was unreasonable was so incorporated with the rest that it could not be severed. The variations and additions to the conditions were not printed in conspicuous type ; and the answer to the 6th question was not correct, and that the question as to this was under the statute to be answered, by the Judge, not the jury : *Ballagh v. Royal Ins. Co.* 44 U. C. R. 70, S. C. 5 A. R. 89-99.

June 30, 1883. HAGARTY, C. J.—As the authorities now stand we must hold that a condition requiring notice of any “alienation” or “assignment” of the property insured does not apply to the case of a mortgage being given on

the property: *Sands v. Standard Ins. Co.*, 26 Gr. 113, *S. C.*, on rehearing, 27 Gr. 167.

The defence then has to rest on the additional condition No. 5. "When property insured shall be alienated, or in case of any transfer or change of title to the property insured, or any part thereof, or of any interest therein, *or in case the same is encumbered by way of mortgage or otherwise* without the consent of the company endorsed hereon, or if the property insured shall be levied upon or taken into possession or custody under any legal process, or the title be disputed in any proceeding at law or equity, this policy shall cease to be binding upon the company."

The latter part of this clause, as to the property being levied upon, &c., was held to be an unreasonable condition, as it is worded, in the case of *May v. Standard Ins. Co.*, 5 A. R. 605, and the cases are fully noticed.

It has been suggested that, as the condition is one, and part of it has been held unreasonable and improper, the whole must be rejected.

I do not accede to that view, and consider the condition to be properly divisible.

In the late case of *Brown v. Manchester, Sheffield, & Lincoln R. W. Co.*, R. 10 Q. B. D. 250, (a) the plaintiff sent fish by rail under an agreement that the company would carry at a lower rate than the ordinary, the plaintiff relieving them "from all liability for loss or damage by delay in transit, or from whatever other cause arising." To this the plaintiff replied, in writing, that he agreed to relieve them from all claim or liability for loss or damage.

The Lords Justices held this to be an unreasonable condition, and that it was "one and indivisible."

Baggallay, L. J., says: "Although, no doubt, in the risk note there are the words, 'by delay in transit, or from whatever other cause,' the way in which the undertaking is given is, 'I undertake and agree to free and relieve the railway companies from all claim or liability for loss or

(a) This case has been reversed in the House of Lords. See 31 W. R. 491.—REPORTER.

damage.' It is a single provision * * it appears to me the contract is indivisible."

Brett, L. J.: "I think it is one indivisible allegation of the condition imposed by the company as the condition on which they will carry fish, by which the company is absolved from any liability for loss or damage to the goods arising in transit, from whatever cause arising; and it seems to me that it would absolve the company from any loss or damage to the goods arising by any negligence, or any wilful act, not only of the company's servants, properly so called, but also of those who are not properly called the servants of the company, but who are the persons who carry on the business for the company, &c. * * I myself have no doubt in my own mind that a condition to carry under these circumstances, *without incurring any responsibility whatever*, is wholly unreasonable * * no condition can be reasonable which would lessen the liability of the railway company lower than that of a gratuitous bailee."

I do not think that this decision will help the plaintiff's contention here. The condition to which the plaintiff there agreed was one universal absolution of the company from every possible liability. In our case the condition merely states several distinct things of different characters which the assured must not do—transfers or changes of title, encumbering by way of mortgage or otherwise, the property being levied on or taken in execution, or the title being disputed in any legal proceeding. One of these may be most unreasonable and the rest perfectly fair.

I am also of opinion that a company may properly require full information as to the state of the title, and that they may legally, as well as reasonably, make the correctness of the applicant's statement as to title the basis of his right to enforce his contract with them.

It seems to me of vast importance to their determination to reject or to accept a proposed risk to know whether the applicant be the absolute owner, or a tenant for three, or five, or fifty years; whether the property be unencumbered

or mortgaged to fifty or seventy-five per cent. of its value, or beyond its value. It requires slight demonstration to prove the value of correct information on these points.

In that view they require the applicant to answer certain questions, and he is informed that such answers shall be held "to form the basis of the liabilities of the company."

Question 12. Is the property mortgaged? if so, state the amount. Is there any insurance by the mortgagee? Answer. \$5,000 to Farmers' Loan and Savings Company.

There were, in fact, two existing mortgages to the Farmers' Loan and Savings Company; one for \$5,000, executed in March, 1874; another for \$2,000, in February, 1876; and at the time of the application \$6,160 were owing on these mortgages. It is insisted that here there was an untrue answer and the policy became void.

It is also shewn that after the policy certain mortgages were given on the property insured:

August 13th, 1878, to Mark Wilby, to secure endorsements. This was discharged in March, 1880.

On the 14th February, 1880, the plaintiff gave to his partner Smith, retiring from the firm, a mortgage for \$35,000, apparently for his interest in the property and business, Smith having conveyed to plaintiff all his interest.

Several sets of claim papers were put in, the defendants requiring further information; one in December, 1880 verified by plaintiff's affirmation, not containing any statement as to encumbrances; another in March 1881, also verified. Certain questions were there to be answered, No. 9. "Since the date of said policy has said insured property, or any portion thereof, or any interest therein, been sold, pledged, mortgaged, or otherwise encumbered?" Answer. "No."

The last proofs were put in in July, 1881. The question No. 9 is then answered thus: "Since the date of said policy there has been a further mortgage given to my then partner, George Smith, for \$35,000, on his interest in the business and property assigned to me. This is the only further encumbrance. No portion of the property has been sold."

In answer to No. 14, he stated the mortgage to Mark Wilby was to secure endorsements, all of which were paid at maturity.

On 3rd May, 1880, the plaintiff notified defendants that the name of the firm was changed to "Messrs. Wilby & Co."

Defendants acknowledged receipt of this, and gave their assent thereto.

The policy was issued to "Messrs. Smith & Wilby,"

Defences were pleaded, setting up these matters, in substance :

1. False statement as to the state of title in the application.
2. Fraud and false statements in the proofs of loss.
3. Changes in the title by the encumbrancers, &c., not notified to defendants.

At the trial before Cameron, J., the following questions were put to the jury, and the answers thereto are given :

1. Was there any change in the title or interest of the plaintiff, material to the risk, within the knowledge or control of the plaintiff, after the policy was made, not notified in writing to the company, or its local agent? Ans. There was.

2. Was there petroleum, rock oil, or coal oil, or any of their constituent parts, stored or kept in the building containing the property insured? Ans. No.

3. Was there any fraud, or false swearing, or untrue statement in the proofs of loss furnished by the plaintiff to the company? If so, in what did such falsity consist? Ans. Information as to certain mortgages was withheld?

4. Was the representation in plaintiff's application as to the amount of incumbrance true or false? Ans. False.

5. If such representation was false, was it fraudulently made, or with an intention to conceal from the defendants a matter material to be made known to the defendants, to enable them to judge of the risk they undertook? Ans. No.

6. Are the variations and additions to the conditions printed in different coloured ink and in conspicuous type? Ans. Yes.

On these findings the learned Judge entered a verdict for defendants.

It appears to be conceded that the first of the statutory conditions, as to the omission "to communicate circumstances which are material to be made known to the company in order to enable it to judge of the risk it undertakes," does not apply to matters affecting the title.

I do not remember having been called on to give any judgment on this point, but I understand this construction to be generally accepted.

The same construction also appears to be given to clause 3, as to any change material to the risk.

I have already stated that the additional condition No. 5, except as to encumbering by way of mortgage, is not unreasonable.

I think that the findings of the jury shew that this condition was violated: that the representation as to encumbrances in the application on which the contract was based was false: that there was a false statement in the proof of loss as to the mortgages.

The jury negative any fraudulent intent in making the application as to concealment of matters material to be made known in judging of the risk.

It is not contended that there was not evidence sufficient to warrant these findings.

I do not see how we can interfere to disturb the verdict that has been entered.

ARMOUR, J.—The finding of the jury, that the representation in the plaintiff's application as to the amount of the encumbrance was false, is, in my opinion, a bar to the plaintiff's recovery. I give no opinion on the other questions raised in the case.

CAMERON, J, concurred with HAGARTY, C. J.

Order nisi dismissed.

[QUEEN'S BENCH DIVISION.]

HARRON v. YEMEN.

*Power to second mortgage to pay arrears on first mortgagee and distrain—
Purchase by second mortgagee under power in first mortgage—Distress.*

The plaintiff mortgaged his land to the F. L. & S.'s Co. by a mortgage which contained a distress clause, and gave a second mortgage to the defendant, by which it was agreed between them that if default was made in payment of interest to the company the defendant should be at liberty to pay it, and should have the same remedies for its recovery from the mortgagor that the company had. Default having been made the company exercised their power of sale, and the defendant became the purchaser. After signing a contract for the purchase he distrained the goods of the plaintiff for the interest that had fallen in arrear to the company. Shortly afterwards he obtained a formal conveyance of the land, expressed to be under the power of sale in the company's mortgage.

Held, that the plaintiff's estate having paid the mortgage debt to the company in full the defendant could not be said by means of his purchase thereof to have paid the interest in arrear so as to entitle him to distrain therefor.

ACTION for the conversion of certain goods.

Defence. That the plaintiff on the 25th day of January, 1882, conveyed to the defendant lot 21, in the 10th concession of Huron, by way of mortgage, for securing the sum of \$275, payable in two years thereafter, with interest annually at the rate of ten per cent. per annum: that prior thereto, and on the 8th day of July, 1881, the plaintiff had conveyed the said land to the Freehold Loan and Savings Company by way of mortgage for securing the sum of \$2,200, payable in ten years, with interest annually at the rate of six and a half per cent. per annum, which said last mentioned mortgage contained powers of sale and of distress for arrears of interest: that by the firstly above mentioned mortgage it was agreed by and between the plaintiff and the defendant that should the plaintiff make default in the payment of the interest secured by the secondly above mentioned mortgage the defendant might be at liberty to pay the same, and in such case he should have the same powers of collecting the same from the plaintiff as the mortgagors in the secondly above mentioned

mortgage named might have, together with interest thereon at the rate of ten per cent. per annum: that the plaintiff made default in the interest due by virtue of the secondly above mentioned mortgage on the 8th day of July, 1882, and that the defendant paid the same, and distrained the said goods and sold the same for the purpose of collecting the said interest so paid by him.

Reply. That the plaintiff did make default in payment of the said interest, but that the defendant did not pay the same; and further, that in consequence of the non-payment of the said interest the mortgagees in the secondly above mentioned mortgage exercised the power of sale contained in their said mortgage, and sold the said land to the defendant for the sum of \$2,482, which covered the whole amount due to them for principal and interest, and conveyed the said land to the defendant by a deed absolute in form.

Issue thereon.

The action was tried at the last Assizes at Goderich before Galt, J., with a jury, when it appeared that the plaintiff on the 8th day of July, 1881, had conveyed by way of mortgage lot 21, in the 10th concession of Huron, to the Freehold Loan and Savings Co., for securing the sum of \$2,200, payable in ten years, with interest annually at the rate of $6\frac{1}{2}$ per cent., which mortgage contained powers of sale and distress for arrears of interest: that the plaintiff on the 25th day of January, 1882, had conveyed by way of mortgage the said land to the defendant for securing the sum of \$275, payable in two years, with interest annually at the rate of ten per cent. per annum, which mortgage contained the following clause: "And it is hereby agreed by and between the parties hereto, that should the mortgagor make default in the payment of the interest secured by a certain mortgage upon the said lands and premises to the Freehold Loan and Savings Co., the said mortgagee may be at liberty to pay the same to the said company, and in such case he shall have the same powers of collecting the same from the said mortgagor

as the said company might have, together with interest thereon at the rate of ten per cent. per annum :” that the interest due to the Freehold Loan and Savings Co., on the 8th day of July, 1882, was not paid, and that company took proceedings to collect it, and on the 4th of December, 1882, they wrote to defendant, as follows : “R. W. Harron. We are now suing this account. The amount of our arrears is \$146, and law costs say \$70. Total arrears \$216. Should you wish to stay proceedings you must move immediately;” and on the 9th of December, 1882, they served him with a notice of sale of the said land to be held on the 21st day of December, 1882, at 12 o’clock. The defendant attended the sale and purchased the said land, and executed an agreement under his hand and seal appended to the conditions of sale, by which he agreed with the Freehold Loan and Savings Co. to purchase the said property, subject to the foregoing conditions of sale, for the sum of \$2,482, of which \$1,202 should be cash and the balance should be payable within one month, with interest at 6 per cent. per annum. The defendant paid the \$1,202 on the same day, and subsequently and within a month paid the balance of the purchase money and received a deed of the said land from the said company conveying to him the said land, which deed bore date the 16th day of January, 1883. On the 28th day of December, 1882, the defendant issued a distress warrant to a bailiff, authorizing him to distrain the goods and chattels of the plaintiff on lot 21, in the 10th concession of Huron, for the sum of \$143, being the amount of interest for one year, due 8th July, 1882, upon a mortgage made by the plaintiff to the Freehold Loan and Savings Co., “of which interest default has been made in payment by said Harron, and the same has been paid by me in pursuance of the terms contained in a certain mortgage upon the said lot, dated 25th January, 1882, made by said Harron to me.” On the 29th day of December, 1882, the bailiff distrained the plaintiff’s goods mentioned in the pleadings, and sold the same on the 6th day of January, 1883. The plaintiff

paid the year's interest on the defendant's mortgage, which fell due on the 25th day of January, 1883, and this action was brought on the 6th day of February, 1883.

The plaintiff in his evidence said that he had a conversation with the defendant on the subject of the sale of the land about a week before the sale: that he asked the defendant if he would not pay off the mortgage and he would deal with him, that he wished him to pay the company the interest, the interest only: that he had a further conversation with the defendant before the sale: that the defendant called to him as he was coming out of Kincardine, and said: "I hear they are selling you out over there": that he answered, "it looks a great deal like it," and said, "I want you to pay the interest, and I will pay you ten per cent.," and defendant said, "I will pay it and settle with you": that he saw the defendant on the 25th of December, 1882. He was asked, "What took place then between you? Did he not tell you that an arrangement had been made between him and the company whereby he had taken up from them the amount of your debt to himself?" to which he answered: "No, I understood from him that he had bought the place."

The defendant, in his evidence, said that he met the plaintiff in the suburbs of Kincardine: that he said to him, "Your farm is to be sold," and he said he would be in to the sale, and he would rather he, defendant, would get it into his hands than the company: that he went to Kincardine on the day of the sale and saw the agent of the company, and made an arrangement with him, which was contained in the agreement for purchase: that he saw plaintiff on the 25th, and said to him that he came to arrange with him to see if he would not pay up the arrears of interest and costs, and that plaintiff agreed to meet him at Kincardine, on Thursday, (28th), to arrange about the arrears of interest and costs, but did not do so: that he stated to the plaintiff that he had bought off the company's claim for \$2,482, but if they could not show that there were \$70 costs, he, the defendant, was to get a rebate of whatever

surplus there was, and that he told the plaintiff he could go on the same as he was if he could pay up the arrears of the interest and the costs of the sale. The plaintiff was to come into Kincardine on that Thursday to arrange the matter. He wanted Mr. Scott to be present as his solicitor. The defendant, on cross-examination, said that he told the plaintiff on the 25th that he had bought the company's interest, and on being asked what took place on the day of sale, said that he went to Kincardine, got there about 11 o'clock and met Mr. Armstrong, the company's agent, as he was going down stairs and asked him if he was Mr. Armstrong, and told him who he was. They went to the Royal Hotel together and met on the way another party to whom he was going to sell the farm, and then about twelve o'clock they met and went into the sitting-room, and Armstrong said: "Now let us come to business; the best thing you can do is to buy the company's interest in this:" that he had bought the company's interest before the sale: that the place was put up at auction at his request: that after he had signed the agreement the property was put up by the company's agent to be sold to any body that would bid for it: that if he could have got enough at that sale he would not have required to dis-train on the plaintiff at all. In his examination before the trial he said that Armstrong bid \$2,482 on his behalf, and it was knocked down to him at Armstrong's bid.

The plaintiff in his evidence denied that anything was said by the defendant to him on the 25th on the subject of his paying the interest on the mortgage, and that the defendant never mentioned interest: that defendant said, "When will you be up in town?" and he said, "I will be out about Thursday," and defendant said, "I will be out about Thursday; I won't promise to a day, but we will see each other there:" that he did not promise to meet him on the Thursday, nor was there any mention of what was to be done if they did meet.

The learned Judge charged the jury with respect to the purchase by the defendant, as follows: "It appears to me

that the effect of the transaction was, that Mr. Yemen purchased from the Loan Company. He never paid this interest in exoneration of the plaintiff. The plaintiff paid it himself, because it was his property which was the means from which the Freehold Company were paid their interest; therefore it could never be said that Mr. Yemen had paid that money. He paid the money in one sense that is to say, he paid a certain sum of money to the company which included this, but the consideration he received for that was the property of the plaintiff himself. In my opinion, as a matter of law, the plaintiff is entitled to recover."

It was objected that the charge was wrong, upon the ground that the property was not vested in the defendant, the mortgagee: that the mortgagee, the defendant, only became mortgagee in respect of two mortgages instead of one, as he had been in the outset: that the subsequent conveyance really vested nothing in him, because, as he became the owner of the mortgage by the transaction with the agent of the company, he could not afterwards order a sale, and he became the possessor.

The jury found for the plaintiff, and \$250 damages.

May 25, 1883. *J. K. Kerr*, Q.C., obtained an order *nisi* to shew cause why the judgment obtained in this cause should not be set aside and a judgment entered for the defendant, or a new trial had between the parties, on the ground that the judgment was contrary to law and evidence, and that the defendant, being a mortgagee of the lands referred to in the pleadings, and having paid off the prior mortgage upon the said lands, was, under the provisions of the said mortgages, entitled to distrain upon the said lands for the moneys in respect of which such distress was made, and on grounds disclosed in the evidence and pleadings herein.

June 4, 1883. *J. K. Kerr*, Q.C., in support of the order *nisi*. The defendant, by exercising his power of distress, elected to take the position of mortgagee, and give the

plaintiff a right to redeem. This being so he must be considered to be merely assignee of the mortgage of the Freehold Loan Company, and not an absolute purchaser; and being assignee, he paid the interest as well as the principal due to the company, and so under the clause in his second mortgage he had a right to distrain as he did do.

Lefroy, contra. Whatever right to redeem any subsequent acts of the defendant may have given to the plaintiff no question of any right to redeem is raised on the pleadings. There are two questions involved, and two only, viz., whether a *puisne* mortgagee can purchase at a sale, instituted by a prior mortgagee under his power of sale; and, secondly, whether, if so, the defendant did so purchase. The cases *Watkins v. McKellar*, 7 Gr. 584; *Shaw v. Bunny*, 33 Bea. 494, S. C. in App. 2 De G. & S. 468; and *Brown v. Woodhouse*, 14 Gr. 682, shew clearly that a *puisne* mortgagee can so purchase.

Then that being conceded, the defendant cannot deny that he purchased absolutely. If the case stopped at the contract under seal it would be sufficient; the defendant is estopped by his own deed. But to make his present contention still more untenable, after the contract the defendant took not an assignment of the mortgage, but a deed of absolute conveyance, reciting the mortgage, default and sale under the power. Clearly the charge of the learned Judge is correct; the defendant did not pay the interest; he paid the interest with the plaintiff's land; what the defendant did was to purchase the land, but the land belonged to the plaintiff.

June 30, 1883. ARMOUR, J.—No objection is now taken of any misdirection of the learned Judge who tried the cause, nor is it objected that he ought to have left any other questions to the jury than those which he did leave; but the contention now is that the verdict is contrary to law and evidence.

The best evidence of the position the defendant intended

to assume at the sale by the company is to be derived from what he did as shewn by the documentary evidence, and from this it is clear that he intended to become the purchaser of the land and not of the mortgage, or of the company's interest in the land as mortgagees thereof.

He entered into a contract of purchase for the land at a named price, he paid the purchase money and obtained from the company a deed of the land expressed to be made under and by virtue of the power of sale contained in their mortgage, and in his evidence he swore that the arrangement he made with the company was contained in the contract of purchase.

He, although a second mortgagee, was entitled to become the absolute purchaser of the land under the power of sale contained in the first mortgage, and to hold the same irredeemable by the mortgagor, and his afterwards receiving the interest which fell due to him upon the second mortgage would not have the effect of making him a mere mortgagee in respect of his absolute purchase of the land under the power of sale contained in the first mortgage, because he was entitled, notwithstanding such purchase, to collect, by virtue of the covenant contained in the second mortgage, the principal and interest which fell due to him thereunder, no part of which was covered by the purchase money of the land.

Nor do I see anything in the evidence which would warrant the plaintiff in having him declared, notwithstanding such absolute purchase, a mortgagee merely of the said land; but were there such I do not see how it could affect this action.

The defendant obtained no assignment of their mortgage, nor of the powers contained in it from the company, nor did he distrain or profess to distrain, nor allege in his pleadings that he distrained under the power of distress contained in their mortgage, either in their name or in his own, as assignee thereof; but he distrained and professed to distrain, and alleged in his pleadings that he distrained only under and by virtue of the agreement in his own

mortgage contained, "that should the said mortgagor make default in the payment of the interest secured by a certain mortgage upon the said lands and premises to the Freehold Loan and Savings Co., the said mortgagee may be at liberty to pay the same to the said company, and in such case he shall have the same powers of collecting the same from the said mortgagor as the said company might have, together with interest thereon at the rate of ten per cent. per annum."

The plain meaning of this agreement is, that the mortgagee may pay to the company, that is, satisfy and discharge the claim of the company by virtue of their mortgage to be paid, the interest so in default, and in such case he shall have, &c. Now did the defendant pay to the company the interest so in default? I think clearly not, but it was paid to the company by their sale of the plaintiff's land, and the plaintiff's land having paid the interest so in default, the defendant in making the distress was attempting to make the plaintiff's goods pay it too. In my opinion the verdict is right, and the order *nisi* ought to be discharged, with costs.

HAGARTY, C. J.—I agree in the result of my brother Armour's judgment.

I think the power specially given in the second mortgage to distrain must be pursued with reasonable strictness. If defendant paid the interest on the first mortgage, he could distrain therefor, as the society could have done.

The object of such an agreement was obvious. It was a ten years' mortgage. Plaintiff was not bound to repay any part of the principal until ten years, but if the interest were not paid the whole would become due, and his estate could be sold.

It is clear that the society proceeded to exercise their power of sale on this default of interest, and the defendant agrees in writing on the conditions of sale, and on the day appointed for the sale he agrees to purchase the property on the conditions for \$2,482, so much cash and

balance in a month. Then the auctioner proceeds formally to sell, and it is knocked down to defendant as the highest bidder; and on 16th January following (within three or four weeks) a formal conveyance is made to him expressed to be under the power of sale.

The legal effect of this must be to vest in defendant, (apart from his position as second mortgagee), the whole estate and equity of redemption of the plaintiff. The mortgage to the society is thus fully discharged, at the cost of plaintiff's whole estate.

In the interval between the agreement and the formal sale by auction and the execution of the conveyance the defendant distrains, as set forth in his warrant, for the \$143 of interest due on the society's mortgage in the preceding July, plaintiff having made default in payment, and the sum having been paid by defendant in pursuance of the terms contained in the mortgage made by plaintiff to defendant.

It appears to me that defendant had no right so to act, and that he must not be allowed to say that because he has purchased the plaintiff's whole estate under the power of sale he has paid the interest on the society's mortgage.

I cannot see how any verbal agreement that defendant tried to prove can sanction his proceedings. The plaintiff insists that all he wished defendant to do was to pay the interest.

Defendant says that prior to the sale he met the plaintiff and told him the farm was to be sold, and he said it was, and he would rather defendant got it into his hands than the company.

I can see no evidence of an agreement, even verbal, that defendant was to purchase the property as he did under the power of sale. I think he did so at his own risk, and not under any authority or contract with the plaintiff.

I do not think we need discuss the ultimate effect of the position of defendant as purchaser of the equity of redemption and as second mortgagee.

CAMERON, J., concurred.

Order nisi discharged.

[QUEEN'S BENCH DIVISION.]

THOMPSON V. THE CANADA CENTRAL RAILWAY COMPANY.

Railway company—Compensation—Gift of land—Statute of Limitations.

S., being the owner of lands through which the defendants desired to build their road, agreed to give them the right of way, and the company, with his written permission, took possession without compensation and constructed their road, and had up to this time been in uninterrupted possession for more than ten years. The plaintiff, claiming under S. now demanded compensation and obtained a mandamus *nisi* to proceed to arbitration under the Railway Act, 1868.

Held, affirming the judgment of GALT, J., that the plaintiff was not entitled: that S. having the right to accept any or no compensation, and having elected to take none, the company then became entitled to the lands, and the plaintiff could not succeed.

Per GALT, J. The ten years possession of the company had extinguished the title of S. and those claiming under him, and vested it in the company.

THIS was a case tried before Galt, J., at Ottawa, on the return to a rule *nisi* for a writ of mandamus, commanding the Canada Central Railway Company that in pursuance of the statute in that behalf they should forthwith serve upon Philip Thompson a notice as prescribed by the Railway Act, 1868, containing a description of certain lands taken possession of by them, &c.

The lands in question formerly belonged to Nicholas Sparks, deceased, and Philip Thompson claimed as his assignee, the lots being numbers 35 and 36 in the broken front concession, on the Ottawa River, in the township of Nepean, and the said Thompson claimed to be the person entitled to the compensation for the said lands so taken. The mandamus *nisi* was issued on 10th June, 1881, and a return thereto was made on the 17th September, 1881. The return set out, so far as material,

1. A denial of the right of the said Nicholas Sparks, or any person claiming under him, to compensation for the said lands.

2. A statement of the incorporation of the company.

3. An allegation that in the year 1865 they duly located their land in the township of Nepean and prepared

the map or plan and book of reference required by law, and filed the same in the proper office. This was proved.

4. That they afterwards applied to the said Nicholas Sparks as to the compensation to be paid to him by the said lands, and that he agreed that they should have the right of way over the said lots 35 and 36 without compensation. This was proved.

5. That afterwards in the year 1868 they, with the knowledge and consent of the said Nicholas Sparks, constructed their railway across the said lots, and had ever thereafter continuously and uninterruptedly occupied and enjoyed the said lands. This was proved.

6. That about the time of their taking possession of the said lands the said Nicholas Sparks by an instrument in writing assigned and conveyed the said lands to them. This was not proved.

7. That no disagreement ever arose between them and the said Nicholas Sparks. This was proved.

8. That the said Nicholas Sparks was greatly interested in the success of the undertaking, and that the rest of his lands were greatly improved in value. There was no question on either of these points.

9. That if the said Nicholas Sparks, or any person claiming under him ever was entitled to compensation or damages for the said lands, the claim arose more than ten years before this application was made, and was barred by the statute for the limitation of actions and suits.

This paragraph of the return was demurred to, on the ground :

1st. That it neither traversed the right to compensation nor did it confess and avoid it.

2nd. The Statute of Limitations was no bar to the right of the said Philip Thompson to recover compensation.

This paragraph was clearly proved, and the only question was whether the Statute of Limitations was a bar to the claim.

The applicant filed seven pleas, all of which were disproved except the 5th, which denied that the said Nicholas

Sparks did by writing assign and convey the said lands to the company. This plea was not disproved.

At the close of the case at Ottawa, the learned Judge adjourned the case to Toronto, and on the 13th December it was argued by

Gormully, for the applicant, and
McTavish, for the company.

February 1, 1883. GALT, J.—I have no doubt that Mr. Sparks verbally promised to give the right of way to the company, but there was no evidence of a written conveyance. There is nothing in the Railway Act, 1868, or in any other with which I am acquainted, which dispenses with written evidence of title. It is true that in certain cases agreements for sale confer a title on a railway company, when such agreements are filed and the purchase money paid; also in cases of award, where the award is filed and the money deposited in Court; but there is none where a verbal promise is of itself sufficient to confer a title. The company must therefore rely on the Statute of Limitations alone as an answer to this claim.

Mr. Gormully contended that the Statute of Limitations is no answer to an action claiming a writ of mandamus, and relied on the case of *Ward and another v. Lowndes*, E. & E. 940. No doubt that case establishes that a plea, "that the alleged causes of action did not accrue within six years before this suit," to a declaration claiming a mandamus under secs. 68, 69 of the English Common Law Procedure Act, the same as secs. 275, 276 of our Act, is bad; but at the same time the Judges of the Exchequer Chamber, (the Judges in the Queen's Bench having given no judgment on the plea) all appear to have considered that there might have been considerable difficulty if the defendant below had pleaded that six years had elapsed between the accruing of the debt from the commissioners and the transfer of it to the local board.

Martin, B. at p. 958, says: "I express no opinion as to

whether a plea that six years had elapsed between the accruing of the debt and its transfer to the local board might not be good."

In the present case the company expressly aver that if the said Nicholas Sparks or any person claiming under him ever was entitled to compensation or damages for the said lands the claim arose more than ten years ago before this application was made, and is barred by the statute for the limitation of actions and suits; and by the 5th paragraph they expressly aver that they constructed their railway in the year 1868, and have been ever since continually and uninterruptedly in possession.

By the 4th section of the Real Property Limitation Act, R. S. O. ch. 108, "No person shall make any entry or distress, or bring any action or suit to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or bring such action or suit, first accrued to some person through whom he claims."

By sec. 23, "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon, or payable out of any land or rent, but within ten years next after a present right to recover the same accrued to some person capable of giving a discharge for or release of the same."

By the Interpretation Clause, sec. 2, the word "'Land' shall extend to messuages and all other hereditaments, whether corporeal or incorporeal, and to money to be laid out in the purchase of land (and to chattels and other personal property transmissible to heirs), and also to any share of the same hereditaments and properties or any of them," &c.

The effect of the Statute of Limitations on real property was fully considered in the case of *Dawkins v. Lord Penrhyn*, L. R. 4 App. Cas. 51. At p. 64 Lord Penzance says (I may mention that the Statute of Limitations had not been specially referred to in the grounds of demurrer, the

demurrer concluding thus, "and on other grounds sufficient to sustain his demurrer"): "But it has been said that this matter has not, upon the pleadings, been treated in a way to do justice to the plaintiff: it is said that the defence cannot be raised upon demurrer. I think the analogy drawn from cases in which the Statute of Limitations is applicable to debts at common law is an analogy that fails, for the reason which has just now been mentioned to the House. The Statute of Limitations as applied to debts is a statute that does not put an end to the debt, it merely prevents the remedies; and it may be taken advantage of or it may not be taken advantage of, according to the volition of the defendant. But the Statute of Limitations applying to real property, as has been pointed out, does more than that; it goes to the root of the plaintiff's claim. As the learned Master of the Rolls said: 'In that case it is not a bar of the claim, it is a divesting of title, or a transference of title to somebody else. If therefore it appears on the face of the claim that the title which was once in the claimant has passed to somebody else, that is a good ground for demurrer.' That, again, I think, seems unanswerable. If the result of the statute is that upon the face of the claim, as stated, the title is no longer in the plaintiff, surely that is a matter which may be raised by demurrer."

At the trial before me I was satisfied that the company had been in uninterrupted possession of the lands occupied by them for upwards of ten years before the writ issued; consequently the title which was at one time in the person through whom the applicant claims, had been divested and had become vested in the company. See also sec. 15 of the same Act, by which the right and title of the plaintiff are declared to be extinguished.

This application is made under subsec. 10 of sec. 9, Railway Act, 1868, 31 Vic. ch. 68, D., and its object is to compel the company to proceed to arbitration under that Act, but such subsec. applies only to the owners of lands, and as the applicant is not the owner of the lands now in the

occupation of the company my verdict must be for the defendants.

I give judgment that the rule *nisi* be discharged, with costs.

May 23, 1883. *Gormully*, moved to set aside this judgment. There are two issues in the case; an issue of law, and an issue of fact. The issue of law is the statute of limitations, which cannot be pleaded as a bar to a writ of mandamus: *Ward v. Lowndes*, E. & E. 940; *Fisher's Digest*, 5649; *Darby & Bos.*, on Limitation, 8 & 9; *Lloyd* on Compensation, 47. Then, it is said that the effect of ten years' possession under the statute is to extinguish the title of the former owner and to transfer it to the person in possession by a sort of statutory conveyance. It is not the land which is being sought, but compensation for the taking of the land, the remedy being an action grounded on a statute and requiring a twenty years limitation to bar it: *Banning* on Limitations, 16; *Cork and Bandon R.W.Co. v. Goode*, 13 C. B. 826; *Shepherd v. Hills*, 11 Ex. 55; Consol. Stat. C., ch. 66, secs. 5 & 6., sec. 9. sub-secs. 6, 22. As to the question of fact, there is no evidence of a gift; that is, a gift perfected by conveyance: there is at the most evidence of a promise to give merely. The promise was without consideration, and is not enforceable at law. A Court of Equity does not decree the specific performance of imperfect gifts: *Callaghan v Callaghan*, 8 C. & F. 401; *Fry*, on Specific Performance, 192; *Richards v Delbridge*, L. R. 18 Eq. 11; *Battle v. Knocker*, 46 L. J. Ch. 159. Then, as to the question of waiver of the right to compensation, the plaintiffs submit that such a right could not be waived by parol.

James MacLennan, Q. C., (*McTavish*, with him) contra. The judgment is right, and should not be disturbed. The land owner cannot treat the company as trespassers, having told them to go into possession. It is quite clear that having gone into possession the title vested in the company: *Tapping* on Mandamus, p. 340, sec. 291.

June 30, 1883. HAGARTY, C. J.—I think it appears with reasonable certainty on the evidence, that the owner of these two lots in 1868 was much interested in the progress of the railway, and in its success: that work was begun on his lands, and the road located across them in 1868: that Mr. Scott, the company's solicitor, was engaged in procuring the right of way: that he prepared a paper or writing giving the right of way across Mr. Skead's adjoining property, which Mr. Skead signed, and went with Mr. Scott to Sparks, and the latter at once agreed to give the necessary land to the company free, *i. e.*, as a gift, without compensation, and signed the paper as Mr. Skead had done.

Mr. Scott and Mr. Skead are very clear as to his declaration that he would give the land free to them.

Mr. Skead does not remember seeing Sparks sign the paper, but knowing that he (Skead) had signed it, and that Scott had it, Sparks said at once to Skead that he was willing to do as Skead had done, in giving the land free without compensation.

It seems thus clearly proved that Sparks licensed the company in writing to lay out the road across his lots, without requiring any compensation.

They acted on this and laid out their line chiefly in 1868. Sparks lived four years after this, and never made any claim on the company. He, after having given this writing, and after most of the work was done, told one of the witnesses, Stephenson, that he had given the company the right of way over these lots free.

We thus have it proved that they took possession and built their road with his consent and license.

He could not eject them therefrom. All that could be claimed would be the right to compensation under the statute. The land was gone. The statutable compensation must alone be resorted to, standing in lieu of the land.

Now, as regards this compensation, the owner would

have the most unbounded right to do as he pleased about it—to accept a large or a small, or a nominal sum for it, or to give the right of way as a free gift.

I am unable to see any difficulty in dealing with this question. It seems to be simply a question of fact whether Mr. Sparks did or did not arrange with the company as to the matter of compensation.

See General Railway Act Consol. Stat. C. ch. 66; *Ib.* 1868, ch. 68.

I understood Mr. Gormully to insist that without deed Sparks could not divest himself or vest in the company the right to the land or compensation.

As already noticed, the latter, the compensation, or the right thereto, stands completely in lieu of the land, which Sparks could not retake.

I gather from the evidence that both the lots were wholly unimproved, and I would infer that men like Mr. Skead and Mr. Sparks would probably gladly give the right of way across these properties for the great advantages the opening of the railway would probably give them. It was stated that Sparks was a corporator or promoter of defendants' company. He is named as such in the Special Act, 1861.

If Sparks had given the company a receipt for \$1, expressed to be in full for compensation for the right of way across these lots, can it be doubted but that it would be as legally sufficient as the most elaborately framed conveyance? Or, if he had signed a memorandum to the effect that if the company would bring their road across his lots, he would give them the necessary land free, and they did so bring their line, would he not be bound thereby?

It appears to me that what he has done is much to the same effect.

He had a perfect right to waive all claim for compensation, and I think he did so, having good consideration in his own view of the case for so doing.

I think the appeal from my brother Galt's judgment

should be dismissed, with costs, but I rest my decision on the grounds above stated, and not on the Statute of Limitations, as I see some difficulties in applying it to a case like this.

ARMOUR and CAMERON, JJ., concurred.

Appeal dismissed.

[QUEEN'S BENCH DIVISION.]

REGINA EX REL. BRINE V. BOOTH.

Municipal Act—Liquor license—Disqualification as councillor—Partnership.

The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Parkdale council the defendant, with the consent of the license commissioners, transferred his interest in the license to his brother, in order to qualify as a councillor, but the business continued as before.

Held, affirming the decision of the Master in Chambers, that a license cannot lawfully be transferred except in the cases mentioned in R. S. O. ch. 181, sec. 28, none of which had occurred here: that the consent of the commissioners did not validate the transfer, and therefore that the defendant, who retained his interest in the license, was not qualified to be a councillor.

Per ARMOUR, J. The Act disqualifying a licensee should be construed strictly, and should not be extended to the partner of a person lawfully holding a license in his own name.

On the 25th day of May, 1883, *Shepley* moved by way of appeal from the judgment of the Master in Chambers, 9 Pr. R 452, unseating the respondent on the ground that he was at the time of his election as municipal councillor for the village of Parkdale a shopkeeper licensed to sell spirituous liquors by retail, and as such was not qualified to be a member of the council.

It appeared that the nomination of candidates for the offices of Reeve and Deputy Reeve and Councillors for the village of Parkdale took place on the 22nd day of December,

1882, and the election was held on the 1st day of January following, and the respondent was duly elected as councillor for that village.

A summons in the nature of a *quo warranto* was issued on the 14th day of February following, directed to the respondent, at the instance of the relator, who alleged, amongst other things, that the respondent was not duly or legally elected or returned, in this, that the respondent was at the date of the said election and still was a shop-keeper licensed to sell spirituous liquors by retail, and as such not qualified to be a member of the council of the village of Parkdale. Such allegation was supported by the affidavit of the relator who said "that at the date of the said election, and before and ever since that time, and at the present time, the said George S. Booth was and is, as I am informed and do verily believe, a member of the firm of Booth Bros., which said firm carry on business in the said village of Parkdale as shop-keepers, and are licensed to sell and do sell spirituous liquors by retail: that business is carried on by the said Booth and his brother at the said place of business under the said firm name. The said firm name is printed or painted upon said place of business, and upon the waggons and carts and bill-heads used in connection with such business; and the said George S. Booth both before and at the date of and ever since the said election, and at the present time, appears in every way to be an active member of said firm, and actively engaged in said business: that there has been no change or any outward or apparent alteration or difference in any way in the connection with and interest in said business on the part of the said George S. Booth since said election, and bills and accounts for sales of spirituous liquors by retail from said firm in the name of the said Booth Bros. have, to my knowledge, been rendered by said firm since the 1st day of January, instant, to customers of the said firm in the said village of Parkdale."

The respondent answered the said allegation by his own affidavit, in which he said: "That some time previous to

the election in the relation herein mentioned I ceased to have or hold any license of any description for the sale of spirituous liquors, and at the time of and ever since the said election I have not had nor held either in or under my own name, or that of Booth Brothers, any such license to sell such liquors."

He also filed the affidavit of his brother Thomas William Booth, who said: "That in or about the month of October, 1880, my brother, the said George S. Booth, and I commenced business as general grocers in the said village of Parkdale, and we have since continuously carried on said business: that for some time prior to the 9th day of December, 1882, the said George S. Booth and myself held a license from the proper authorities in that behalf to sell spirituous and fermented liquors by retail, such license being in the name of Booth Bros.: that during the said month of December last mentioned application was made to the proper authorities in that behalf for a transfer and assignment of said license from Booth Bros. to me, and on the said 9th day of December last past the said transfer was formally made to me: that now and ever since the 9th day of December last past, I alone have held a license to sell such liquors by retail on the premises situate and being part of lot number 8, on the north side of Queen street in the said village of Parkdale, and neither now nor at any time during said period, nor since the 9th day of December last past, has the said George S. Booth had any such license: that the said George S. Booth and myself are jointly entitled to and owners of said lot number eight."

Aylesworth shewed cause, and

Shepley supported the motion.

June 30, 1883. ARMOUR, J.—By R. S. O. ch. 174, sec. 74, it is provided that "No shop-keeper licensed to sell spirituous liquors by retail shall be qualified to be a member of the council of any municipal corporation."

This being a disqualifying clause must be construed strictly and according to its very words, and we cannot extend its disqualifying effect by implication: *Regina v. Oldham*, L. R. 4 Q. B. 290; *Lewis v. Carr*, L. R. 1 Ex. D. 484; *Feuvrie v. Lankester*, 3 El. & Bl. 530.

It will be for the Legislature, and not for us, to make it read "no shop-keeper licensed to sell spirituous liquors by retail, nor the partner of any such shop-keeper, nor any person interested in the business of such shop-keeper to carry on which business such license is granted, shall be qualified," &c.

I cannot agree that it is the business in the particular place which is licensed, but it is the person that is licensed to carry on the business in the particular place; and if the license had been originally issued to Thomas W. Booth alone, I would have held George S. Booth not to be disqualified.

But the license was issued to both George S. Booth and Thomas W. Booth under the name of Booth Brothers, and would remain in force till the 30th of April, 1883, except in the case of the occurrence of the events provided for in the 28th and 30th secs. of R. S. O. ch. 181.

The license was not transferable except in the case of the happening of the events provided for in the 28th section, none of which events did happen. And the License Commissioners had no power or authority to consent to any transfer of a license except upon the happening of some one or more of such events.

I think therefore that the attempted transfer of the said license by Booth Brothers to Thomas W. Booth, and the consent thereto by the License Commissioners, was a futile and void proceeding, and that Booth Brothers were still at the time of the election licensed to sell spirituous liquors by retail, and that consequently George S. Booth, the respondent, was not, at the time of the election, qualified to be a member of the municipal corporation of the village of Parkdale.

The appeal will therefore be dismissed, with costs.

HAGARTY, C. J.—I feel very great difficulty in holding that the learned Master was wrong in holding the defendant to have been disqualified.

The spirit of the Act, R. S. O. ch. 181, has been in my view clearly violated, and it is to be hoped that the decision may be within its letter.

The Booth Brothers were in partnership in this business, and were jointly licensed from April, 1882, to April, 1883.

There is much force in the learned Master's view that it is the business that is licensed, and the license is not merely personal to the licensee to sell liquors generally, but to sell it in the conduct or course of a particular business conducted in a specified place and manner.

The "true owner of the business of the tavern or shop proposed to be licensed," sec. 9, subsec. 3, of R. S. O. ch. 181, is the person to whom it is to be granted, and it should appear that he is the true owner. The commissioners should not, as I read the law, grant licenses except to the true owners; and when two men are as partners together carrying on the business as liquor sellers, I see no reason for granting license except to both; otherwise a partner with a mere fractional or nominal interest in the business could alone take the license.

There are many reasons why the true owner or owners beneficially interested should be the licensees, in view of the grave liabilities, civil and otherwise, the law imposed on licensed liquor sellers.

I conclude from the evidence here that the alleged transfer of the license in December was made for the express purpose of enabling defendant to qualify at the early January elections. This is said to be quite allowable. I do not dispute this if it be done so as wholly to remove disqualification. A contractor may release or assign his contract to enable him to escape the disqualification arising therefrom; but then he must wholly clear himself from it; he cannot qualify himself simply by going through a form or executing a writing, however clearly worded, if he in reality remains as before interested in the contract.

Then, as to the alleged transfer, it seems clear that no case arose under the statute allowing a transfer.

R. S. O. ch. 181, sec. 28, provides if "any person having lawfully obtained a license before the expiration of his license dies, or sells, or by operation of law or otherwise assigns his said business, or removes from the house or place in respect of which the said license applies, his said license shall *ipso facto* become forfeited, and be absolutely null and void unless such person, his assigns or legal representatives, within a month after the death, assignment, or removal of the original holder of such license * * obtains the written consent of the license commissioners either for the continuance of the said business, or to transfer such license to any other person, and thereupon forthwith transfers the same to such other person, who, under such transfer, may exercise the rights granted by such license, subject to all the duties and obligations of the original holders thereof, until the expiration thereof, in the house or place for which such license was issued, and to which it applies, but in no other house or place." See also the amendment to this section, 44 Vic. ch. 27. sec. 1, 1881.

It seems perfectly clear that under this section no transfer should have been allowed, none of the events specified having occurred.

Then, it may be suggested, can we review the action of the commissioners in sanctioning the transfer? I think we can for the purpose of ascertaining whether this case is within the disqualifying clause or not. We are not questioning the exercise of their discretion in granting or withholding a license. We are examining whether the defendant, a person licensed to sell liquor up to April, 1883, sufficiently put an end to his disqualification on the eve of the election in January, though continuing to sell liquor exactly in the same way as before up to the expiration of the license.

I think in this light and for the purpose of this case we have the right to make this enquiry, and if no transfer could have been legally made, we are not bound by a form irregularly adopted, either by the complacency or the

inadvertence of the commissioners. Nor need we discuss or decide whether the defendant after this formal transfer could be properly convicted for selling liquor without license in his own shop and in his own business.

On the whole, I think our judgment should be to dismiss the appeal, with costs.


Although this point as to the invalidity of the transfer was not urged below or before us, I think the party seeking to upset a decision right in its result should pay the costs of his unsuccessful attempt.

CAMERON, J.—I concur in the opinion that the appeal should be dismissed, on the ground that the transfer of the license from the firm of Booth Brothers to Thomas W. Booth, one of the firm, did not put an end to the license, or make George S. Booth, the appellant, less a licensed shop-keeper than he was before the assignment. By sec. 7, ch. 181, R. S. O., the license granted to the firm remained in force for the period of a year from the 1st of May, 1882, that is, to the 30th April, 1883, unless the holders of the license did some act under section 28 which made it void. The events under this section that make the license void, are four: 1. Death of licensee before expiration of the license; 2. Sale by him of his business; 3. An assignment by him by operation of law, or otherwise, of his business; and 4. Removal from the house or place in respect of which the license applies. No one of these events has happened. Therefore Booth Brothers, and the appellant as one of that firm, which still continues, were at the time of the election licensed shop-keepers, and were and each of them was disqualified from holding or being elected to the office of a village councillor. The consent to the transfer of the license by the commissioners in no manner affects the question, as that consent only gave authority to one who already had it to sell liquor. The case is quite distinguishable from *Clancy v. Conway*, 46 U. C. R. 85, decided by me.

Judgment accordingly.

[QUEEN'S BENCH DIVISION.]

PYATT V. MCKEE ET AL.

Lease by Dowress—Purchase by tenant from heirs-at-law—Right to dispute landlord's title—Statute of Limitations—Estoppel. 

P., being the owner in fee of the land in question, died intestate in September, 1853, leaving his wife, the present plaintiff, and two daughters, who resided on the land for a short time after his death. The widow made several leases of the land, and finally leased it to M., the defendant's devisor, who, at the expiration of his lease, took a second lease, with a covenant to deliver up at the end of the term.

He purchased the interest of one of the daughters, and a new lease was thereupon made to him by the plaintiff, the rent being reduced by one-third, because it was considered that the widow and daughters were each entitled to a third of the rents. Pending this lease the tenant purchased the other daughter's interest, and at the expiration of the term in 1873 he refused to give up possession, alleging that he owned the land, and that the plaintiff's right to dower was barred by lapse of time. *Held*, affirming the judgement of CAMERON, J., that M., the tenant, having, while owner of one undivided half of the land, covenanted to give up possession to the plaintiff at the end of the term, and having got into possession under her, the defendants claiming under M. were estopped from disputing her right, and must restore possession to her before setting up an adverse title: that M., by accepting the lease at a reduction of one-third of the rent, on his purchase of the daughters' interest, had acquiesced in the plaintiff's claim as dowress, and was estopped from setting up the Statute of Limitations of her; and that she was entitled therefore to judgement for one third of the land for life, and to *mesne* profits since the expiration of the lease.

Patterson v. Smith, 42 U. C. R. 1, remarked upon.

THIS was an action for the recovery of the north half and part of the south half of Lot number 13 in the 5th concession of the township of North Dorchester, south of the river Thames, County of Middlesex.

The writ of summons was issued 20th February, 1882, but in August following, after service of writ, and before delivery of statement of claim, defendant died, and the action was revived against his executors.

The statement of claim alleged that plaintiff by lease, dated October 8th, 1869, leased the north half, and by parol lease of same date leased part of the south half of said lot to defendant for three years from the 1st January, 1870: that the rent reserved by the written lease was \$80, and by the parol lease \$40, per annum: that the

defendant entered into possession of the land under said leases, duly attorned to the plaintiff, and paid rent to her until the term expired, when he refused to deliver up possession, but remained in possession without paying rent, as an overholding tenant, down to the time of his death.

The statement of defence admitted the tenancy and payment of rent during the term, but denied that defendant had since continued in possession as an overholding tenant, and set up title in defendant as owner of the fee by purchase from the heirs-at-law of plaintiff's husband: that plaintiff's title expired 19th of March, 1873, when defendant became purchaser as aforesaid.

The case was tried before Cameron, J., at the last assizes at London, without a jury.

From the evidence it appeared that one William Purdy at the time of his death in September, 1853, was seised in fee simple of the north half of lot number 13, in the 5th concession of the township of North Dorchester, south of the river Thames, in the county of Middlesex, and twenty-five acres, being the north-west quarter of the south-half of the same lot: that while so seised he died intestate, leaving his wife, the present plaintiff, and two children, then infants, daughters, Sarah Jane and Rachel Elizabeth, him surviving. The plaintiff at the time of her husband's death was living with her children on the land, and leased it on the 20th October, 1855, to one Thomas Jackson, by the description of "the land known as widow Purdy's farm, consisting of 125 acres, of which about forty-five acres are cleared" for eight years; and by a subsequent lease she demised the land to one James Dunham for four years from the 1st March, 1862. At the date of this lease the plaintiff had been married again to one Ralph Pyatt, who signed the lease with her, but was not in terms made a party to it. It purported to be made between the plaintiff, of the first part, and the lessee, Dunham, of the second part. After the expiration of this lease the plaintiff and her husband, Ralph Pyatt, together

demised the north half of the lot to William McKee, the original defendant in this action, for three years from 1st March, 1868, at the rent of \$120.

This lease was made in pursuance of the Act respecting short forms of leases, and contained the covenant No. 8 in Schedule B to that Act, "that he will leave the premises in good repair," or, according to the Act, that the lessee will, at the expiration or other sooner determination of the said term, peacefully surrender and yield up to the lessors the premises demised, with the appurtenances, together with all buildings, erections, and fixtures thereon in good and substantial repair, &c. It also contained the following special provision: "On the last year of the said lessee's term said lessee is to allow any incoming tenant to come on the premises and do fall ploughing after harvest, and said lessee is to have the use of the pasture ground until the 1st day of December, 1870, and the use of the farm-house till the 1st March following.

The plaintiff's daughter Sarah Jane was born on the 2nd June, 1848, and Rachel Elizabeth on the 16th March, 1853. Sarah married one Lawrence Nichols, and Rachel John C. Graham. On the 22nd July, 1869, Sarah and her husband conveyed their interest in the land to the lessee, William McKee, and on the 8th October of the same year a new lease was executed by the plaintiff and her husband to the said William McKee for the term of three years from the 1st January, 1870, at the reduced rent of \$80 a year, but the demise was not in terms different as far as the estate demised went. This lease contained the same covenant to deliver up the premises in repair, and this further special provision: "And it is further agreed that the tenant shall not, during the said term, sell or part with any straw off the said premises, and no manure to be taken therefrom. The lessors to have the privilege of going on the said premises in the fall of the last year for the purpose of ploughing * * The lessors agree to let the lessee retain \$20 out of the first year's rent, which, together with \$30 to be given by the lessee (making in all fifty

dollars), are to be expended by the lessee in cutting and splitting rails to make fences for the farm, said fences to be made during the first year of the lease."

On the 19th March, 1873, Rachel E. Graham and her husband, John C. Graham, conveyed their interest in the land to the said William McKee, who thus became seised of the estate of the heirs of William B. Purdy, subject to the question of the invalidity of Rachel's deed, by reason of her then being a minor. At the time of the conveyance by Rachel Graham (*née* Purdy) and her husband she was an infant in law, being then under twenty years old. After the expiration of the last lease William McKee refused to give up possession of the land to the plaintiff, alleging that he had bought the land and was the owner of it, and that the plaintiff's right to dower was barred by lapse of time; but he paid all rent due and payable up to the end of the term, 1st January, 1873, and also for the period intervening between that date and the time he got the conveyance of the interest of Rachel.

The reason for the reduction of the rent to McKee, after his purchase of Sarah Nichols' interest, was, as represented by the plaintiff, that it was considered that she owned one-third, and each of her daughters one-third, and the eighty dollars, the two-thirds of the \$120, the rent in the first lease, was the share of herself and Rachel. Both Nichols and Graham swore that their wives sold their interest in the land subject to their mother's claim for dower, and for a less price than they would otherwise have taken if their mother was not to be paid; and the learned judge was clearly of opinion on the evidence that this was so, and that McKee, when he bought, bought with the understanding that he was to settle with the plaintiff for her claim, and used that obligation as an argument to induce the heirs to take less for the land than their interest was worth if the plaintiff's claim had not existed. McKee, however, appeared to have been advised that by reason of the lapse of twenty years from the death of her husband she had lost her claim to have her dower assigned to her.

In December, 1873, the plaintiff, through Messrs. Woods & Fisher, of Stratford, made a claim upon McKee, and from the correspondence that passed between them and Messrs McMillan & Taylor, solicitors for McKee, Messrs. Woods & Fisher seem to have taken the view that the claim to dower may have been barred, as their letter of the 10th December, 1873, contains the statement: "Your letter of the 1st remained unanswered so long because we were not able until to-day to see our clients. The statement as to the death of Purdy having taken place over twenty years ago took us by surprise, but we find it is quite true. As to the claim for rent, we find that McKee did pay the three years' rent due under the lease up to the 1st July, 1873, and our letter was written without having proper instructions, our client having called a few minutes after we sent the letter, when we learned that this was the fact. However, the tenancy continued under the lease of necessity, because when the lease expired on 1st January, 1873, no one else could give a title to McKee, one of the heirs-at-law being still an infant. We consider therefore that McKee is now the tenant of Pyatt and his wife, and cannot claim in any other way as against them."

After some further correspondence McKee paid rent as above stated up to the time he got the conveyance from Rachel in March, 1873, and refused at that time to do more. Shortly after, apparently, Pyatt went away from Canada, and according to the plaintiff had not been heard of for six or seven years. Nothing further was done in actively asserting the plaintiff's right till some time in 1881, when one of the plaintiff's sons-in-law took the matter up, and saw McKee with a view to obtaining a settlement, which resulted in an offer in a letter written by him to pay the plaintiff \$15.00 a year during his life. The plaintiff refused to accept the offer, and this action was brought.

The present defendants, except McMillan, were devisees under the will of William McKee, who died in August, 1882, and the action was revived against them. McMillan, who was appointed an executor under the will, renounced.

The plaintiff, in her statement of claim, claimed possession of the land by reason of the lease from her to McKee, and that she might be paid, out of the estate that might have come to the hands of William McKee, for arrears of rent, mesne profits, and damages, the sum of \$1200, and the costs of the action.

At the trial, counsel for the plaintiff contended that the plaintiff was entitled to recover the land, as the defendant's testator by accepting and executing the lease from her to him was estopped from disputing the plaintiff's title and setting up title in himself till after the possession received from her was restored; and at all events, she had a right to dower, which was a sufficient title to enable her to recover under the demise as the reversioner. He contended that the case was distinguishable from those cases where the lessee was not prevented from shewing the lessor's title had expired; and as the deed from Rachel Graham to McKee was void she had a right to represent the interest of her daughter as well, as she was demising by the lease that interest as well as her own. The defendants, on the contrary, contended that there was no estoppel after the term in the lease had expired: that McKee, through whom the defendants claimed, having acquired the fee from the heirs-at-law of William Purdy, they were at liberty to shew the plaintiff's true title, and as dowress she was not at liberty to dispute the heirs' title, nor could she claim in respect to dower, because more than twenty years before action her husband had died. In support of the first position they relied strongly on the authority of the case of *Patterson v. Smith*, 42 U. C. R. 1.

The plaintiff, while admitting that the lapse of twenty years would bar an action by the plaintiff to recover dower, contended it did not bar the right, citing *Laidlaw v. Jackes*, 27 Grant 101; and that being in possession with the consent of the heirs, upon the understanding she was to have a third of the land and rent for her life, she was not deprived of her right or prevented from setting it up in support of a reversionary right under the lease to McKee.

The learned Judge reserved the case, and subsequently delivered the following judgement :

“ I strongly urged on the parties at the trial the propriety of coming to some amicable adjustment, as in that way perhaps more substantial justice would be done than by a decision given in favor of one party or the other in accordance with the strict law of the case. It would seem that they have not succeeded, as I was informed on the first day of Term that my judgment was required. I hope the learned gentlemen really made a *bonâ fide* and earnest attempt to make the settlement, although I fear they didn't take much trouble in the matter, and should the decision I am about to pronounce involve them in further expensive litigation that neither party may be very well able to bear, they will have themselves to blame, the case being eminently one for a compromise.

The case cited on behalf of the defendants of *Patterson v. Smith* is certainly a very strong case in favor of their contention that the defendants are not estopped from showing the plaintiff's true title, and were the circumstances of this case the same I should follow it. But it differs in the essential particular that the title that the plaintiff had at the time of the demise in this case still continues to exist, while in that it had ceased. Still, the language of Mr. Justice Wilson, now Chief Justice of the Common Pleas, would seem to confine the estoppel to the currency of the demise. In quoting from the language of Martin, B., in the case of *Cuthbertson v. Irving*, 4 H. & N. page 758, as follows—‘ So long as the lessee continues in possession under the lease the law will not permit him to set up any defence founded upon the fact that the lessor *nil habuit in tenementis*; and that upon the execution of the lease there is created in contemplation of law a reversion in fee simple by estoppel in the lessor, which passes by descent to his heir, and by purchase to an assignee or devisee,’—he adds: ‘ But that is only during the continuance of the lease, or so long as the real owner does not intervene. That the reversion is in contemplation of law a fee simple is only a

presumption of law : *Sturgeon v. Wingfield*, 15 M. & W. 224; *Cuthbertson v. Irving*, 6 H. & N. at p. 138, per Williams, J. The defendant, as the last case shews, and as many others shew, as lessee, could during Elizabeth Hartly's life have traversed that she was seised in fee of the reversion, and if he could do it then, he can certainly do so since her death. There is no authority which determines that the estoppel between landlord and tenant applies for any longer period than during the continuance of the lease at the most.'

This language would appear to be decisive of the present case against the plaintiff, unless it must be restricted to the case where the lessor's title has expired, and it appears to me it must be so restricted and confined in its application.

Robertson v. Bannerman, 17 U. C. R. 508, and *Mountnoy v. Collier*, 1 E. & B. 630, cited in *Patterson v. Smith* to support the position, that where a plaintiff who had *no title* let to the defendant who paid rent, and before expiry of the term the true owner gave notice to the defendant not to pay rent, the defendant in an action brought against him for use and occupation could shew these facts, although he had not given up possession, and although he had kept possession for the full period of the demise made to him by the plaintiff, do not go that length. In both cases the plaintiff had a title at the time of the demise, which expired before the action. *Mountnoy v. Collier* was an action for use and occupation, in which the plaintiffs were the executors of a sub-tenant and had received notice from the superior landlord to quit, and the defendant, the sub-tenant, was notified to pay the rent to the plaintiff. Erle, J., states the case and his conclusion succinctly thus: 'This is an action for use and occupation, and the plaintiff has proved a demise by him and an occupation by the defendant. The proposed defence is that the plaintiff's title has expired since the demise, and before the period for which the rent is claimed, and the main question is whether the defendant may shew that as a defence, he not having given up possession. I think it is competent for him to do so. *Balls v. Westwood*, 2 Camp.

11, is an authority to the contrary; but there are numerous authorities to shew that a tenant is not estopped from shewing that his landlord's title has expired.'

Robertson v. Bannerman was an action of ejectment. The land in question had been granted to the plaintiff's wife, and during her lifetime the plaintiff allowed the defendant to occupy. The wife died without leaving any children.

In giving judgment Burns, J., said: 'This case does not come within the rule established by the class of cases cited by the plaintiff's counsel, namely, that a tenant shall not be allowed to dispute his landlord's title. The defendant, no doubt, was tenant at will to the plaintiff at the time he was first let into possession of the premises, but since that time the plaintiff has himself ceased to have title. His title was only in right of his wife, and as he did not become tenant by the courtesy his right to the possession became extinct at her death. The case therefore comes within that class of cases which establish that the tenant, though he cannot dispute his landlord's title, yet may shew that it has terminated.' In this language the learned Judge clearly recognizes the binding authority of the rule that a tenant cannot be permitted to dispute his landlord's title, without any other limitation to the disability than that created by the expiry of the landlord's title; and these cases are not authorities to confine the tenant's estoppel to the term in the demise to him, as it is assumed by the learned Judge in *Patterson v. Smith* they do.

There is express authority the other way. In *London and North Western R. W. Co. v. West*, L. R. 2 C. P. 553, the decision is to the contrary. In that case the plaintiffs had, under an Act of Parliament, purchased land, but not requiring it all for the purposes of the railway, one Budd was let into possession, and the defendant went in under Budd, to whom he paid rent. By the terms of the Act of Parliament under which the plaintiffs purchased the land it was provided that all surplus lands not sold or disposed of within ten years after

the time allowed for the completion of the railway should become the property of the owner³ of the adjoining land. This period elapsed in 1859. In 1863 the defendant was let into possession by Budd, and in 1865 the plaintiffs obtained an Act of Parliament allowing them to retain any lands acquired by them by purchase in certain parishes, including that in which the land in question was situated. They had in 1864, before obtaining this Act, given Budd notice to quit. The defendant refused to give up possession, and an action of ejectment was brought, in which a verdict was by consent entered for the plaintiffs, with leave to defendant to move to enter a verdict for him.

The defendant moved on this for a rule to enter the verdict accordingly, and the Court refused to grant it, on the ground that the defendant having entered under Budd both he and Budd were estopped from disputing the plaintiffs' title. The Court declined to determine whether the defendant's title had been put an end to in 1859, and revived by the Act of 1865, or not. Bovill, C. J., said: 'It is not necessary to decide the question which arises as to the construction of the Acts of Parliament, because the defendant under the circumstances is estopped from disputing the plaintiffs' title. The defendant came in under Budd subsequently to the year 1859, when the plaintiffs' title is alleged to have ceased. It is clear he could not have disputed Budd's title if that had been in question, and he cannot, I think, dispute the plaintiffs' title from which Budd's title is derived.'

The language of Willes, J., is directly applicable to the facts in the present case. He said: 'It seems to me that the question is whether, if Budd had been the defendant, * * he could have resisted this ejectment * * and since no change has taken place in the right of the different parties since his tenancy commenced he cannot dispute that the rights of Budd have duly vested in him. Would then Budd be able to dispute the plaintiffs' title? If his tenancy commenced after 1859, when the land is alleged to have been vested in the adjoining owner, there is no

doubt that he would have been estopped from doing so, since a tenant cannot dispute his landlord's title except by shewing that such title has terminated since the commencement of the tenancy.

The plaintiff's title, whatever it may be, was not changed by anything that happened subsequent to the lease to McKee, who was then the owner of an undivided half of the land, subject to any right to dower that may have then existed in the plaintiff, and notwithstanding accepted the lease and covenanted to restore the premises in good repair to the plaintiff at the expiration or sooner determination of the term. The acquisition therefore by him of Rachel's interest in the land did not change the character of the plaintiff's title nor put an end to it, assuming that the deed of Rachel, an infant, cannot be questioned by the plaintiff, a stranger, and was therefore as against her valid.

Since the decision in *Doe Knight v. Smythe*, 4 M. & S. 347, the current of authorities seems to have run uninterruptedly to maintain the principle that a tenant is estopped from denying the title of his landlord, or, in other words, of the person who let him into possession, with the exception of the case in which the landlord's title has expired, and by reason of such expiration the title of some third party has accrued not adversely to the lessor's title. That case clearly establishes that the estoppel continues beyond the term of the tenancy, and I cannot understand how Wilson, J., in *Patterson v. Smith*, came to the conclusion that 'the estoppel which excludes a tenant from disputing his landlord's title ceases upon the expiration of the lease.' It may be so, and with reason in an action for use and occupation, or some right other than the possession of the land. The case of *Bayley v. Bradley*, 5 C. B. 396, cited in support of the contention, was an action for use and occupation, and Wilde, C. J., in citing the passage from *Co. Litt.*, 47 b. at page 400, referred to by Wilson, J., as sustaining the position—'for by the making of the lease the estoppel doth grow, and consequently, by the end of the lease the estoppel determines'—recognizes the qualification, that where

the tenant '*came into possession* under the lessor he must restore the possession before he disputes the title.' I think the learned Judge, then, in *Patterson v. Smith*, must be taken to have used the above language as applicable to the facts of that case, and not as broadly affirming the principle that an estoppel which excludes a tenant from disputing his landlord's title ceases upon the expiration of the lease, is general and not limited by the nature of the action. If it can apply where the landlord is seeking to regain possession, there would be no beneficial estoppel at all in fact, as by the lease, except where the tenant has, by reason of the breach of some term of the lease declared to have that effect, forfeited the term, the tenant would be entitled to retain the land till the expiration of the term, and the landlord would have no right to remove him, and there would be no room for the estoppel to arise. In the present case William McKee, with full knowledge that he himself was owner in fee of an undivided half of the land, expressly covenanted that he would restore the possession of the land to the plaintiff at the expiration of the lease, and having got into possession under her I think he is now estopped from disputing her right, and must restore to her that possession before he can set up against her an adverse title in himself.

The next question is, what is she entitled to possession of, the whole land or only an undivided third as representing her dower? If the estoppel upon the tenant is to be dealt with strictly, she would be entitled to the whole land, that is, the whole of the north half of the lot, or the 100 acres. The twenty-five acres of the south part are not in the same position, as far as the estoppel is concerned. The lease in its express terms is confined to the north half of the lot, and does not cover directly or indirectly the twenty-five acres. I do not think the evidence shews a demise of this land at a rent of forty dollars a year, as alleged in the third and fourth paragraphs of the plaintiff's statement of claim, or that there is any sufficient evidence that the defendant entered on these twenty-five acres under

the plaintiff, and if he did not, the plaintiff has no legal title to the land which entitles her to eject him therefrom. From the plaintiff's examination it is clear she did not intend to claim, after her second daughter, Mrs. Graham, conveyed her interest to McKee, any more than a right to one-third, and the question is, whether I am bound, in obedience to the law of estoppel, to put her in possession of more of the land than she intended to assert dominion over, and thus force the defendants by counter action to assert their title derived through the conveyances to their testator by the heirs-at-law of the owner of the fee. If the plaintiff is put in possession of the whole, an important question, and one perhaps not easy of solution, may arise, as to the effect of the Statute of Limitations in defeating in favour of the plaintiff the defendants' title. It is clear, if the possession of the tenant is to be taken as the possession of the landlord, the title of the heirs of William B. Purdy would now be barred, if they had not conveyed their interest to William McKee. Then would William McKee or those claiming under him be in any better position than the heirs of Purdy, by reason of McKee having had the actual possession of the land, though as tenant of the plaintiff? McKee's title to one undivided half accrued in 1869, and would be barred when this action was brought; and if the deed to him for the other undivided half is void, he would be barred altogether, unless he could avail himself of his actual possession to defend his title against both the claim of his landlord and the heirs of the owner in fee.

The question was discussed and considered in the Common Pleas Division, in the recent case of the *Canada Permanent Loan and Savings Company v. McKay*, 32 C. P. 51, but the circumstances, though somewhat analogous, were different, and the decision in that case cannot be regarded as decisive of the rights of the parties here.

I do not propose to express an opinion upon the point, as I think I am at liberty to decide the case in accordance with what would seem to have been the intention of the parties.

There is no doubt that the heirs of the deceased William B. Purdy recognized their mother, the plaintiffs', right to dower in the land, and that when they sold their interest to McKee they sold subject to that right, and he accepted the conveyance of their interest upon that understanding: that by taking the lease after he had acquired the interest of the elder daughter at a rental of two-thirds the former rent, he acquiesced in a claim on the part of the plaintiff to be entitled to an undivided third of the land for her life, and that was considered the provision to be made for her for her dower; and the defendants are now estopped from setting up that her dower has been barred by the Statute of Limitations, and that dower has not in fact been assigned.

I think the case of *Leach v. Shaw*, 8 Grant 494, is an authority for so holding. In that case the only substantial difference presented to distinguish it from the present is, that a particular fifty acres had been indicated as that which the dowress was entitled to hold in respect of her dower. But I do not see, as was decided in that case, if dower can be verbally assigned, why an arrangement by which a dowress is to have an undivided third is not in effect the same as setting out by metes and bounds, or otherwise indicating a particular portion of the land as that to which the dowress is entitled. It is true, in the present case, it is not shewn that there was any express declaration that the plaintiff was to have an undivided third; but there was what was equivalent thereto, as far as Wm. McKee is concerned, when he accepted a new lease after he had acquired the title of Mrs. Nichols, with a rent fixed at two-thirds the former rent, coupled with the evidence of the plaintiff that the idea for reducing the rent was that she was entitled to one-third and her daughters each one-third.

I shall find that the plaintiff is entitled to recover possession of an undivided third of the north half of the lot to hold during her life, and to recover for mesne profits for the use of the land by William McKee for the six years next preceding the bringing of this action.

the sum of \$240, being at the rate of \$40 a year, and I shall direct that the plaintiff's claim in respect of the twenty-five acres of the south half of the lot be dismissed. The defendants have not been put to any costs in respect of this last claim. I, therefore, allow the plaintiff her full costs of suit.

I have not overlooked an objection taken by Mr. Street that the lease from the plaintiff and her husband, Pyatt, was joint, and the reversion was either in the husband alone or in the husband and wife jointly, and this action is not maintainable without the husband being made a party; but I do not think there is anything in it. The husband here had no estate or interest in the land except in right of the wife, and only joined in the lease for the purpose of assenting thereto. A married woman has now the right of suing in her own name without joining her husband in respect of her own property."

June 8, 1883. *H. J. Scott*, moved to set aside the foregoing judgment. The title of the plaintiff to recover can only be by estoppel, which would not operate against her, she being a married woman, and therefore not being mutual, cannot operate against the defendants' testator. Even if the tenant could not dispute his landlord's title during the tenancy, he can do so after its expiration: *Patterson v. Smith*, 42 U. C. R. 1, and the cases cited there. The title of the plaintiff as dowress, by virtue of which she leased the land, expired in July, 1878, under the Statute of Limitations, and the tenant can shew such expiration of the landlord's title.

E. R. Cameron, contra. The tenant never gave up possession, and cannot dispute the landlord's right until he, does so. The plaintiff as dowress could not lease the land; so the question as to whether her right to dower expired in 1876 is immaterial, as it was not by virtue of her being dowress that she leased. The case of *Laidlaw v. Jackes*, 27 Gr. 101, 29 Gr. 302, shews that her title did not expire in 1876, but only the right of action. What took

place between the plaintiff and her daughters amounted to a verbal agreement that the plaintiff should have one-third of the rent in lieu of dower, and the tenant took the land subject to that agreement. He also cited *Blatchford v. Cole*, 5 C. B. N. S. 574; *Fox v. Macauley*, 12 C. P. 298; *Doe Simpson v. Milloy*, 6 U. C. R. 302; *Johnson v. Baytup*, 3 A. & E. 189, 191; *London & N. W. R. W. Co. v. West*, L. R. 2 C. P. 553.

June 30, 1883.—HAGARTY, C. J.—The judgment of my brother Cameron is undoubtedly the only just result to be arrived at, and we should uphold it unless we are forbidden so to do by some inflexible rule of law.

It is clear that the widow and the two heiresses, her daughters, were perfectly in accord as to their and her position, and that she was entitled to one-third of the property for life. She leased to McKee as if she were sole owner. On the attaining of her majority by one daughter, the tenant purchases her interest, and the rent is reduced to one-third. Another lease is given for three years.

Then in 1872 or 1873 he purchases the other daughter's interest, in the case of both purchases a lower price being accepted in consideration of the remaining interest in the mother.

Nothing can be more unjust under the circumstances than the defendant endeavouring to destroy the widow's right to dower because twenty years had elapsed.

I think we can properly hold that he cannot dispute her right of entry. He entered under her. It is not a case of the tenant having had to attorn under threat of eviction to title paramount. It was the tenant's own act to buy in the interest of the true owners. I think he must give up possession to the widow, his lessor, before asserting such title paramount.

ARMOUR, J., concurred.

Application dismissed.

[CHANCERY DIVISION.]

RUMOHR V. MARX.

Execution—Mortgage—Equity of redemption—R. S. O. ch. 66, secs. 27, 28.

Where R. assigned a certain mortgage to M. to secure payment of two promissory notes of less amount than the mortgage debt, and M. having procured an assignment to himself of a certain judgment against R., the sheriff, pursuant to writs issued under the said judgment, seized the mortgage so assigned, and M. refused to execute a re-assignment thereof to R., until not only the amount due on the promissory notes, but also the balance due under the said mortgage was paid.

Held, that R. was entitled to a re-assignment on payment of what was due on the notes only, for the plaintiff's interest in the mortgage was not properly exigible by the sheriff under R. S. O. ch. 66.

Ross v. Simpson, 23 Gr. 552, distinguished.

THIS was an action brought by John R. Rumohr against Frederic Marx, wherein the plaintiff claimed a re-assignment of a certain mortgage and delivery back to him of certain assignments of mortgage and other deeds, he offering to pay all moneys secured by such assignments of mortgage, and by certain promissory notes, and he claimed, also, such further and other relief as the nature of the case might require.

The facts of the case and the evidence adduced are fully set out in the judgment.

The case was heard at the sittings of the Court at Chatham, on May 12, 1882, before Ferguson, J.

M. Wilson, for the plaintiff. The payment to Barfoot satisfied the judgment whether the defendant was bound to pay it or not. The judgment was paid and extinguished: *Walter v. James*, L. R. 6 Ex. 126. Even if the judgment is valid and subsisting it cannot form any lien on the mortgage. The mortgage could not be seized by the sheriff: R. S. O. ch. 66, sec. 28; *McDowell v. McDowell*, 1 Chy. Ch. 140; *Harrison's C. L. Proc. Act*, 367. The sheriff could not discharge the mortgage on payment. If he sued, he would do so in the name of the mortgagee, and would have no higher right than the mortgagee. There

is no statute authorizing the sale of the equity of redemption in a mortgage in a case like this. I also refer to *Campion v. Brackenridge*, 28 Gr. 201; and *Hewson v. Smith*, 17 Gr. 407.

W. Douglas, for the defendant. The sheriff had a right to seize the mortgage: R. S. O. ch. 16, sec. 27; *Smith v. Bernie*, 10 C. P. 247, and the cases there cited. The sheriff may proceed to sell without waiting to collect: *Ross v. Simpson*, 23 Gr. 552. See too R. S. O. ch. 66, sec. 20. The equity of redemption in the mortgage was seizable by the sheriff, because the mortgage is a chattel. The defendant is entitled to a judgment directing an account of the amount due him, and a sale of the mortgage. I also refer to *Smith v. The Cobourg and Peterborough R. W. Co.*, 3 P. R. 113, S. C. 5 L. J. O. S. 253.

Hewson v. Smith, 17 Gr. 411, was also cited.

September 15, 1882. FERGUSON, J.—The plaintiff was the owner of a mortgage on real property, securing the sum of \$1,794, with interest. On the 4th of January, 1880, the plaintiff borrowed from the defendant the sum of \$300, on his promissory note, and assigned this mortgage to the defendant, as collateral security for the payment of the note. This assignment contains a provision that on due payment of the note the mortgage should be re-assigned to the plaintiff. On the 22nd day of March, 1881, the plaintiff borrowed from the defendant the further sum of \$250 on his note, and a similar assignment of the same mortgage was executed as collateral security for the payment of this note. Neither of these notes has been paid. On the 13th of February, 1880, one Barfoot recovered a judgment in the County Court, in the county of Kent, against the plaintiff and others, for a liability for which the plaintiff was security only, for the sum of \$314.93 debt, and \$19.86 cost, of suit. One of these others was John L. Knapp; and on the 12th of August, 1881, Barfoot duly placed in the hands of the sheriff of Kent executions against goods and lands, issued upon this judgment, to be executed. Knapp was

the owner of valuable lands in the County of Kent, but was apparently largely indebted, and there were writs of execution against his lands in the hands of the sheriff for an aggregate sum apparently exceeding the value of the lands. At all events, the price realized for the lands was not sufficient, after satisfying the mortgages on them, to pay off the executions,

On the 27th of September, 1881, the defendant obtained an assignment of Barfoot's judgment, paying a good, and, so far as appears, nearly the full amount, as a consideration for it. Knapp's lands were offered for sale and sold by the, sheriff, and the defendant became the purchaser for \$1,100; this, of course, being for the equity of redemption, there being large mortgages to be paid off as well. The execution upon the Barfoot judgment not having been satisfied wholly, or in part, the sheriff seized the mortgage in question and certain title deeds of the land in the hands of the defendant, as the property of the plaintiff, for the purpose of satisfying the same, the defendant assisting him, in fact handing him the mortgage for the purpose of the seizure. Afterwards, and on or about the month of November, 1881, the plaintiff offering to pay the defendant the amount of the two notes and interest on the same, requested him to execute an assignment of the mortgage to one Martin, from whom he was apparently intending to borrow the money. This assignment was drawn up as an assignment by the plaintiff and defendant jointly to Martin, and contained clauses that were considered, and I think were, objectionable, so far as the defendant was concerned; but I think nothing turns upon this fact. The defendant refused to assign the mortgage unless the amount of the Barfoot judgment was paid him as well as the amount of the two notes of the plaintiff, for the payment of which he had received it as collateral security. The plaintiff refused to pay the amount of the judgment and brought this suit, claiming a re-assignment of the mortgage and a delivery back of the title deeds on payment of, and he being ready and willing and offering to pay, the moneys secured by the two

assignments of the mortgage and the promissory notes, and also claiming general relief.

The defendant defends the suit on the ground that he is entitled to be paid, not only the amount of the notes but also the amount of the Barfoot judgment before re-assigning the mortgage. There was some discussion about a \$45 note, but I do not think it material. The defendant in giving his evidence at the trial says: "The only reason why I refused to assign the mortgage was because they would not pay me the amount of the judgment."

The plaintiff gave evidence with the view of shewing that there was an agreement or arrangement between Barfoot and the defendant that the defendant should bid up the lands to a sum that would be sufficient to satisfy the judgment. Evidence was also given to shew that immediately after the sale by the sheriff there was an agreement between the defendant and the solicitor of Barfoot that he would pay this judgment, the consideration being Barfoot forbearing to bring suit to set aside the sale; but looking at the whole of the evidence I do not think either of these established, and in the view that I have taken of the case they are not, I think, material.

It was contended that the payment by the defendant to Barfoot had the effect of satisfying the judgment, and that it thereby became extinguished. The defendant was a stranger to the judgment. He did not pay as agent of the plaintiff or, as I think, upon the evidence, in pursuance of any contract or agreement with or on behalf of the plaintiff. When he paid he took an assignment of the judgment. He did not intend to satisfy the judgment, and I do not see how his paying the money to Barfoot under such circumstances could have that effect. The case relied on for this contention, *Walter v. James*, L. R. 6 Ex. 126, seems to me, in the way that I understand the facts, not to support the contention, but rather to make against it.

It was not contended, and I think it could not be successfully contended that, apart from the seizure of the

mortgage in question by the sheriff, the defendant could hold it as a security for the payment of the amount of the Barfoot judgment in addition to the amount of the promissory notes for which it was taken as a collateral security. And the question that appears to me to be the material one is, whether or not the sheriff could legally and properly seize this mortgage and make its value, over and above the amount of the notes, available by sale or otherwise for the purpose of satisfying the writs of execution in his hands, issued on the Barfoot judgment—in other words, was the right that the present plaintiff had to redeem the mortgage by paying the amount of the notes, which in the argument was called the equity of redemption in the mortgage, a kind of property that could be seized by the sheriff, and made available to satisfy the execution?

The plaintiff contended that sec. 28 of R. S. O., ch. 66 does not apply to the case. The defendant contended that sec. 27 of the same chapter applies because the mortgage was made a chattel by the statute, and that the equity of, redemption in it could be seized and sold by the sheriff without waiting to collect under section 28 and following sections, citing *Smith v. Bernie*, 10 C. P. 247 where the late Chief Justice Draper is reported to have said: "When once the statute declares that the sheriff may seize any money, &c., it makes these enumerated things chattels, liable to be taken in execution. As to money and bank notes it would be absurd to speak of selling them * * and as to notes, bills, bonds, specialties and other securities for money, the sheriff is authorized to collect them, though in *Mutton v. Young*, 11 Jur. 414, Wilde, C. J., seems to assume that the sheriff should turn them into money as soon as possible without waiting till they arrive at maturity," &c. From this counsel argued that the mortgage being a chattel, the sheriff could seize and sell the interest or equity of redemption of the plaintiff under the provisions of section 27, but I cannot think this contention correct, though apparently logical. I need not

here repeat the sections of the Act, with which every practitioner is familiar. When the Legislature authorized the seizure of securities as chattels it pointed out, as I think, unmistakably the mode in which the sheriff should realize upon them for the satisfaction of the writ of execution in his hands, namely, by suing upon them, and he is not obliged to bring such a suit until he is indemnified as stated by the Act; and this seems to me to exclude the idea of the sheriff selling such securities, as he would a chattel of the ordinary kind seized by him.

No case has been referred to in which such an interest as the one in question here has been taken in execution by a sheriff. I have not succeeded in finding such a case, or what I can consider an authority for such a seizure. I do not see that such a case is in words provided for by the statute, and being unable to conceive how the sheriff can carry into effect such a seizure according to the provisions of the statute, I am of the opinion that the seizure was unauthorized.

I do not think the mortgage was, at the time of the seizure, a mortgage belonging to the person against whose effects the writ of execution was, within the meaning of section 28, for he had assigned it, and had only the equity to get it back upon payment by him of a large sum of money.

I think this case differs materially from *Ross v. Simpson*, 23 Gr. 552, for, as to the equity of redemption in the leasehold, there was no doubt that the leasehold could be sold on a *fi fa.* goods; it was a chattel. And as to the equity of redemption in the stock, the Act declares that stock and shares shall be saleable like other personal property.

I am therefore of the opinion that the plaintiff is entitled to a re-assignment of the mortgage, and a re-delivery of the same and the two assignments thereof to the defendant as well as of the title deeds mentioned in the pleadings, on payment of the amount due or owing in respect of the promissory notes for the payment of which the mort-

gage was assigned as a security ; and if the parties cannot agree as to this amount there may be a reference to the Master at Chatham. There may be another way in which the defendant can make the plaintiff's interest available for the payment of the Barfoot judgment. As to this I say nothing. As to the costs, I think the plaintiff, by not making a proper tender and demand and by asking the execution by the defendant of an assignment such as the defendant was not obliged to execute, forfeited his right to costs up to the time of the filing of the statement of defence, but, looking at the reason given by the defendant as the sole reason why he did not comply with what the plaintiff required, and the way in which the action has been defended, I think the defendant should pay the plaintiff's costs incurred after the filing and delivery of the statement of defence.

[CHANCERY DIVISION.]

MOORE V. MELLISH.

Will—Charge on Land—Purchase from executor—Unlimited trust.

A testator, after directing that his funeral charges and debts should be paid by his executor, disposed of his real and personal estate as follows : First, he gave and bequeathed certain legacies “to be paid out my estate,” and then he gave the residue and remainder of his estate, real and personal, to his son W. absolutely, and he nominated W. sole executor.

Held, that the legacies were, by the will, charged upon the estate, real and personal, and failing personal estate became a charge on the land ; and that W. had power to sell the land, and a purchaser from him was not bound to see to the application of the purchase money.

THIS action was brought for the purpose of having the unpaid balance of certain legacy of \$1000, bequeathed by the will of one James Walsh, declared to be a lien and charge upon certain lands, that were at the time of his death the property of the testator, but which had since that time passed into the hands of the defendant, and for payment thereof out of the said lands.

The circumstances of the case are fully set out in the judgment.

The case was heard at Stratford, on March 23rd, 1882, before Ferguson, J.

W. C. Moscrip, for the plaintiff. The legacy is charged on the land by the will: *Robson v. Jardine*, 22 Gr. 420 ; *Hellem v. Severs*, 24 Gr. 320 ; *Dart* on Vendors and Purchasers, 15th ed., vol. 2, pp. 613-614, and cases referred to in the foot notes ; In *re Euton Estate*, 7 Pr. 396 ; *Clark v. Clark*, 17 Gr. 17 ; *Harrold v. Wallis*, 10 Gr. 197 ; *Jones v. Jones*, 15 Gr. 40 ; *Carter v. Carter*, 26 Gr. 232. The deed from W. Walsh to Boulton is subject to the encumbrance, in the registry office, and in the general registry. Without the will there was no chain of title in the registry office. The defendant cannot claim to be a purchaser for value without notice : *Smith v. Bonnistel*, 13 Gr. 29 ; *Elliott v. Dearsley*, L. R. 16 Ch. D. 322.

E. Martin, Q. C. for the defendant. The executor could sell and give a good title, which he did do, and the defendant has it. It is to be presumed that the executor sold for proper purposes. The purchaser was not bound to enquire as to whether the sale was warranted: *Lewin on Trusts*, 6th ed., pp. 404, 405, 418; *In re Tangreuray, Willaume and Landau*, W. N. for 1882, p. 19; *Colyer v. Finch*, 5 H. L. C. 905; *Storry v. Walsh*, 18 Bea. 559; *Robinson v. Lowater*, 17 Bea. 592; *Corser v. Cartwright*, L. R. 8 Ch. 971. Knowledge of the contents of the will, whether got from the registry office or otherwise, would not prevent the purchaser from getting a good title. I also refer to *Close v. Phipps*, 7 M. & G. 586; *Fraser v. Pendlebury*, 31 L. J. C. P. 1.

October 3rd, 1882. FERGUSON, J.—The late James Walsh, of the township of Seneca, by his last will gave several legacies, and then the residue and remainder of his estate. The words of the will, so far as material, are as follows:—

“My will is, that my funeral charges and just debts shall be paid by my executor hereinafter named. The residue of my real estate and personal property, which shall not be required for the payment of my just debts and funeral charges, and the expenses attending the execution of this my last will, and the administration of my estate, I give, devise, and dispose thereof as follows, that is to say:—

“FIRST. I give and bequeath to my daughter Mary Walsh the sum of \$1,000 lawful money of Canada, to be paid out of my estate without interest, in the following manner: In yearly instalments of \$200 each, first payment to commence two years after my decease, provided she claims no compensation as wages for services rendered to me since she became of age, also the melodeon and two beds, she to have first choice of one of the beds.

“SECONDLY. I give and bequeath to my daughter Eliza Moffatt, the sum of \$400, without interest, to be paid out of my estate in the following manner: The sum of \$200 in seven years after my decease, and the sum of \$200 in eight years after my decease.

“THIRDLY. I give and bequeath to James Albert Schooly, and to Sarah Jane Schooly, and to Mary Ann Schooly, infant children of my daughter Ann Jane Schooly, who is now deceased, the sum of \$100 each, to be paid out of my estate without interest when Sarah Jane Schooly, or the youngest of them, shall arrive at the age of twenty-one; should either of these last

mentioned parties die before receiving their legacy, to be equally divided between the survivors.

“FOURTHLY. I give, devise, and bequeath all the residue and remainder of my estate, both real and personal of every description, to my son William Walsh, to him, his heirs and assigns, to his and their use and behoof forever; and furthermore, I do hereby nominate, appoint, and empower my son William Walsh to be the sole executor of this my last will and testament.”

Evidence was given shewing that the testator had not personal property more than enough to pay his debts and funeral expenses, but left the north-east half of lot 10, in the 4th concession south-east of Stony Creek Road, in the township of Seneca, and that Mary Walsh did not claim the wages mentioned in the will. William Walsh went into possession of the land, and paid several payments of the legacy, the balance of which is now in question.

This balance is the sum of \$200 and interest, and is, as I understand, the last instalment of the legacy to Mary Walsh, who by deed dated the 6th day of June, 1881, assigned and transferred all the moneys coming to her under the will to the plaintiff, who now claims this sum or balance, and some interest upon it.

The testator died on the 8th of January, 1874. The will was proved by William Walsh on the 23rd of the same month, and was registered on the 20th of March, 1876.

On the 9th day of March, 1876, William Walsh mortgaged the lands to the plaintiff to secure the sum of \$1,000. This mortgage was registered on the 20th March, 1876. William Walsh afterwards conveyed the equity of redemption in the same lands to one Lizzie Boulton, and this conveyance is expressed to be “subject to the encumbrances in the Registry Office against the said lands, and in the General Registry.”

On the 10th day of June, 1879, Lizzie Boulton and her husband, John Boulton, mortgaged the lands to William Walsh for the sum of \$1,400, and this mortgage was registered on the 13th of June, 1879. On the 12th day of July, 1879, the mortgage was assigned to the

defendant by William Walsh, and for this the defendant says he paid the full amount as the consideration, which, I have no doubt, is the fact. On the 18th of March, 1881, Lizzie Boulton and her husband assigned the equity of redemption in the lands to the defendant, and he in consideration thereof released and discharged them from personal liability upon the mortgage. This release was registered on the 10th May, 1881. The defendant says that at this time he had not heard of the claim now made by the plaintiff, or of any claim of Mary Walsh. The defendant has also lately paid and satisfied the mortgage to the plaintiff.

This suit is brought for the purpose of obtaining payment of the balance of the legacy to Mary Walsh out of this land, the plaintiff being assignee of the right, if any, as already stated.

The chief contentions were two: First, as to whether or not the legacy was charged upon the land; and, secondly, if it were so charged, as to whether or not the defendant has a good title notwithstanding; that is, as to whether or not the defendant has a title to the land independent of the charge. As to the first question, I am of the opinion that the legacy was by the will charged; upon the estate, real and personal, and that, if the fact is that there was no personal estate to satisfy it, it was or became a charge upon the land. See *Jarman on Wills*, 3rd ed., vol. 2, p. 556, and the cases there cited, as to the former distinction between debts and legacies being charged; and *Watson's Compendium*, p. 29, and the cases there referred to. The legacies were to be paid "out of the estate." They were not directed to be paid by the executor. The gift to William Walsh was a gift of the residue, and I think there cannot be any reasonable doubt that the legacies were charged. I think many authorities shew this.

Then as to the second question: The case of *Corser v. Cartwright*, L. R. 7 H. L. 731, seems to decide that an executor, who is also a devisee of an estate charged

with the payment of debts, may be presumed by a *bond fide* purchaser or mortgagee of that estate to be dealing with it for the purpose of administration, and may give a valid title to it, and that such purchaser or mortgagee will not be bound to see to the application of the purchase money, and that mere absence of statement of the purpose for which the money obtained is to be used will not make the purchaser or mortgagee liable on the ground of a presumed knowledge that the money was to be applied otherwise than for the payment of the testator's debts.

In this case reference is made to the older case, *Elliott v. Merriman*, 2 Atk. 43, (which the Lord Chancellor said is always referred to,) in which no distinction is made as to whether it was expressed to be made for the payment of debts or not. In the latter case it is said:—"If there be a mere charge on the devisee in fee taking an estate charged with the payment of debts alone, or with the payment of debts and legacies, if he sells the great convenience of mankind requires that it should be just as if an executor sells when the property comes to him, unless it can be shewn that the purchaser knew that the purchase money was not going to be so employed, and that he was auxiliary to something like a fraud. It is to be presumed, because he may presume that the sale has taken place in the ordinary administration of the duties which were imposed upon the executor of the will."

In *Corser v. Cartwright* the Lord Chancellor says:—"I very much incline to think that when a party, the devisee of real estate charged with the payment of debts, sells, the purchaser has no need to inquire at all whether the money is applied in payment of debts, or whether it is a sale for the purpose of enabling the debts to be paid." And in that case it was held that the burden was upon the appellants of proving that there was distinct notice given to the mortgagee of the intention of misapplying the money.

In *Lewin on Trusts*, 7th ed., p. 421, it is said:—"It is clear that the devisee can, where he fills the character of

executor, make a good title, and in some of the cases the Court did not in terms rely on the characters being combined, but it is singular that no authority can be found in which the question whether the devisee alone can make a good title has arisen."

In *Storry v. Walsh*, 18 Beav. 568, the Master of the Rolls, after referring to his former decision in *Robinson v. Lowater*, says:—"This Court holds that if an estate be charged with the payment of debts, the charge enables the executor to make a good title to the purchaser unless the debts are all scheduled, but if the estate be charged with the payment of scheduled debts, then the purchaser must see to their payment, and so if the estate be charged with the payment of legacies only, that would not release the purchaser; but if the estate be charged generally with the payment of debts and legacies, the charge will save the purchaser from [the necessity of seeing to the due application of the purchase money. One of the grounds on which they have held that a purchaser is bound to see to the application of purchase money in the payment of specified sums, is that it is a thing which he may easily do, and that thereby the due performance of the trusts is secured; but if the trust is for the payment of the debts generally, it is impossible that the purchaser could be certain that all the debts were paid. No person would buy an estate so circumstanced if he were bound to see to the application of the purchase money, for he would in such case become liable for the incomplete performance of an undefined and unlimited trust. That is the principle. Accordingly, if there be an indefinite trust previous to a definite trust, such as a charge of debts and legacies generally, the purchaser is not bound to see to the application of the purchase money, because he must see to the payment of the debts before that of the legacies, and this would compel him to see to the due performance of an unlimited trust by another."

In *Johnson v. Kennett*, 2 M. & K. 624, and 6 Sim. 384, it was held that where an estate is charged with the pay-

ment of debts and legacies, and the debts have been paid but not the legacies, the purchaser will not be bound to see to the application of the purchase money unless it be proved that he knew of the payment of the debts; and the taking of a general bond of indemnity, or a bond of indemnity against the legacies only, will not raise an inference that he knew of such payment.

Now, in this case the testator directed that his funeral charges and his debts should be paid by his executor; then he gave the residue of his real estate and personal property which should not be required for the payment of his debts, &c., by giving these legacies, and by giving the residue and remainder of his estate, both real and personal (after these legacies) to his son William Walsh, whom he appointed his executor; and I think the principle of the authorities that I have referred to, shewing that a purchaser is not bound to see to the application of the purchase money, applies. That William Walsh had power to sell the land cannot, I think, be doubted; and I think it cannot be said that if a purchaser from him were bound to see to the application of the purchase money, he would not be compelled to see to the due performance of an unlimited trust by another. The charge was, as I have said, upon the real and personal estate. It was only the residue of these, after the payment of the debts, &c., that was given to pay the legacies, and only the residue after the payment of both that was given to William Walsh; and I am of the opinion that if a purchaser from him were bound to see to the application of his purchase money he would not be compelled to see to the performance of an unlimited trust by another of the kind referred to in the authorities, and I therefore think such a purchaser was not so bound.

The case of *McMillan v. McMillan*, 21 Gr. 594, and the cases there cited, and the R. S. O. ch. 107, sec. 7, and ch. 99, sec. 7, may also be looked at. By these sections it is provided that the *bonâ fide* payment of any money to and the receipt thereof by any person to whom the same is payable upon any express or implied trust, or for any

limited purpose * * shall effectually discharge the person paying the same from seeing to the application, or being answerable for the application thereof, unless the contrary is expressly declared by the instrument creating the trust or security.

Then, William Walsh having the power to sell, and the purchaser from him not being bound to see to the application of the purchase money, such purchaser would take a good title, notwithstanding the legacies, unless he knew that the purchase money was not going to be employed in payment of the legacies, and was, as it is said, "ancillary to something like a fraud." There is not evidence to shew that the plaintiff, when he took the mortgage from Walsh, was in such a position, nor is there evidence that Lizzie Boulton occupied this position. It was sought to shew that she purchased with knowledge of the legacies, and that her purchase was subject to them, and the words in the conveyance to her, which I have already referred to, were relied upon to shew this. These words have not, in my opinion, the effect contended for.

The most that can be said in favour of the contention, I think, is that by reason of what is stated on the face of the deed she had notice of the contents of the will, and this would not make her position different from what it would have been had these words not been in the deed, for as the will was a link in the chain of title, and was registered, she would be affected with notice of its contents, and according to the opinion that I have expressed, she could have acquired a good title, she having at the time full knowledge of the contents of the will.

The allegations in the statement of claim that Lizzie Boulton agreed to pay interest on the balance of the legacy in question, was not proved. There was no contention that the defendant had any notice or knowledge of any dealings between Walsh and the Boultons beyond what appears on the face of the conveyance, and I find as a fact that he had not. He pleads that he was a purchaser for value without notice, and I find that this plea is fully

proved, for I do not, for the reasons I have already stated, think notice of the contents of the will such notice as would affect his title.

I am of the opinion that the lands in question in the hands of the defendant are not subject to the payment of the claim of the plaintiff, and that the defendant has a good title, notwithstanding the legacies mentioned in the will of the late James Walsh, and I think the action should be dismissed, with costs.

[CHANCERY DIVISION.]

BANK OF MONTREAL ET AL. V. HAFFNER ET AL.

Mechanics' lien—Priority—Res judicata—Parties—R. S. O. ch. 120.

Where B. gave a mortgage to W., and afterwards employed G. to do certain work and furnish materials on the property mortgaged,

Held, that G. was entitled, under R. S. O. ch. 120, sec. 7, to a lien for the amount owing for the said work and materials in priority over W.'s mortgage in respect of the increased value of the said property by reason of the said work and materials.

Held, also, that although W. had previously commenced proceedings under an alleged lien in respect of the said property against B., subsequently to the commencement of which proceedings the work was done in respect of which the present lien was now claimed, it was not necessary that G. should have been made a party to the former action, and the fact that G. was not included in the Master's report in that action, as among those holding liens against the property in question, was no bar to his maintaining this one.

Each lien under the Mechanics' Lien Act stands on its own footing, every lien-holder being entitled to security upon the enhanced value arising by reason of his work and materials.

THIS is a suit to establish a mechanics' lien. The bill of complaint was filed on March 16th, 1881, by the Bank of Montreal, the Canadian Bank of Commerce, and the Goderich Foundry and Manufacturing Company (limited), plaintiffs, against John Haffner, and Thomas Worswick, defendants. Certain others were originally joined as defendants, as joint liquidators with the said Thomas Worswick, of the Worswick Engine Company, hereinafter mentioned, but their names were afterwards, by amendment, struck out, it appearing that before the filing of the bill they had assigned to Worswick all their right, title, and interest in the mortgage, in which they had been interested as said liquidators in the manner hereinafter explained, and in respect to which they had been made parties to this suit.

The cause was taken *pro confesso* against the defendant John Haffner.

The facts of the case are fully set out in the judgment.

The suit first came on for hearing at Goderich, on March 22nd, 1882, before Ferguson, J., but after the examination

of two of the witnesses the plaintiffs applied to postpone the case, they not being ready with the evidence, and by agreement it was ordered that the venue should be changed to Toronto.

The case again came on for examination of witnesses and hearing at Toronto, before Ferguson, J. on March 22nd, 1882.

D. McCarthy, Q. C., for the plaintiffs. The defendants stood quietly by and allowed the work to be done. They are "owners" within R. S. O. ch. 120, sec. 2, sub-sec. 3. As to the former suit brought by the Worswick Engine Company, the plaintiffs, or those through whom they claim, were not necessary parties to that suit. The bill in that suit was filed on February 14th, 1878. The effect of the Mechanics' Lien Act is to give the plaintiffs priority over the defendants, and they are entitled to a decree as prayed, the form of which may be found in Mr. Holmsted's annotated edition of the Act, at p. 67.

W. Cassels, for the defendants. The right to sell subject to the mortgage is all that the plaintiffs can get. The facts that appear here make the case different from the case on demurrer, reported 29 Gr. 319, and the conclusion should be different. As to the former suit brought by the Worswick Engine Company, the plaintiffs should have come in and proved. There cannot be two or three sales for a lien: *Holmsted's Mechanic Lien Act*, p. 34. The plaintiffs not having proved their claim under that suit they are barred, unless it is open to them to come in yet under that reference. The matter is *res judicata*.

D. McCarthy, Q. C., in reply. The whole estate must be sold, and this is the only way the matter can be worked out.

The following were also referred to on the argument: *Hansard v. Hardy*, 18 U. S. 455; *Gwynne v. McNab*, 2 Gr. 124; *Phillips on Mechanics' Liens*, secs. 237-238; *Mechanics' Lien Act*, R. S. O. ch. 120, secs. 3 and 6; *Leggo's Ch. Pr.*, vol. 2, p. 1092; Ch. G. O. 184, 244, *et seq.*, 273, 444, and 447.

October 3, 1882. FERGUSON, J.—The bill was filed by the plaintiffs for the purpose, amongst others, of having it declared that they are entitled in respect of a certain lien which they, the plaintiffs, say they have under the provisions of the Act known as “The Mechanics’ Lien Act,” to priority over the defendant Worswick, in respect of a certain mortgage of which he is now the owner, which mortgage was made by one Brodie in favour of the Worswick Engine Company, whose assignee of the same, (through liquidators,) the defendant Worswick is. The lien is claimed to have arisen by reason of work done and machinery provided by the Goderich Foundry and Manufacturing Company, under a contract with Brodie, entered into after the execution of the above-mentioned mortgage by him. The plaintiffs, the Bank of Montreal and the Canadian Bank of Commerce, are assignees in certain proportions of the rights in respect of this alleged lien of the plaintiffs the Goderich Foundry and Manufacturing Company, and the defendant Haffner is the assignee in insolvency of Brodie, and is stated to be as such assignee entitled to the equity of redemption in the lands and premises in question, which are a certain mill property on the west-half of lot No. 10, in the ninth concession of the township of Maryborough, in the county of Wellington (a).

The answer of the defendant Worswick states that the work done and materials furnished for and in respect of which the plaintiffs claim the lien were with express notice that the company through whom he claims had machinery, &c., on the premises of a large value which had been

(a) The prayer of the plaintiffs’ bill was (1) that it might be declared that they were entitled to priority over the defendants, the liquidators of the Worswick Engine Company, in the amount by which the selling value of the lands in question had been increased by the work and materials of the plaintiffs the Goderich Foundry and Manufacturing Company; (2) that an account might be taken of the amount in which they were entitled to priority over the said defendants, and that the latter might be ordered to pay the same when so ascertained, and in default that their right, title, and interest in the said lands or any part thereof might be foreclosed, and that all necessary accounts might be taken, and for general relief.

replaced and then was in the mill. He declines to admit that the plaintiffs, or any of them, were entitled to the lien claimed by them. He sets up the fact of a former suit having been brought for the same cause by the Goderich Foundry and Manufacturing Company, the bill of complaint in which was dismissed; that the company through whom he claims also had a lien under the provisions of the Mechanics' Lien Act upon the same premises in addition to their mortgage; that the company brought a suit in respect of that lien, and such proceedings were had therein that the plaintiffs, amongst many others, were made parties in the Master's office; that the plaintiffs and some others did not prove any claim or subsisting lien, charge or encumbrance on the lands and premises, and that the Master reported that he, the defendant Worswick, one Kirkpatrick, and one Cookson appeared to be the only lien-holders and encumbrancers on the property, and the lien of the defendant Worswick appeared to be first in priority, and the said report was duly filed and became confirmed. He submits that the suit should have been brought within ninety days after the work was completed, and says the plaintiffs' bill is on this ground demurrable, and claims the same relief as if he had formally demurred thereto. It was also contended by the defence that there had been an agreement between the Goderich Foundry and Manufacturing Company and the Company through whom the defendant Worswick claims, that the former company should not have any lien under the said Act for the work and materials to be done and provided by them, and that the plaintiffs for this reason were not entitled to the lien they claim to have.

It was contended, too, that the Goderich Foundry and Manufacturing Company had brought a suit upon the lien and had obtained a decree therein, and that in that suit all the relief asked in this suit could be obtained if the plaintiffs were entitled to it, and that for this reason the plaintiffs should not be permitted to succeed in this suit.

As to the demurrer, that has, so far as I am able to perceive, been disposed of in the plaintiffs' favour by the judgment of the Court reported in 29 Grant 319.

As to the contention respecting the suit that was brought by the Goderich Foundry and Manufacturing Company, in which the bill was dismissed, it was admitted by counsel that the bill had only been filed, and that the dismissal was for want of prosecution, and I think it plain that this dismissal was not upon the merits. As to the contention on the ground that the plaintiffs, or those through whom they claim, failed to prove their claim in the suit brought by the Worswick Company against Brodie, it appears that the bill in that suit was filed on the 14th of February, 1878, and that the agreement under which the work was done and the materials provided, for which the plaintiffs claimed the lien, was made and bears date the 24th of June, 1878. The work was done and the materials provided after this date. The plaintiffs' lien could not consequently have had an existence till long after the commencement of that suit, and, being guided by the decision in the case of *Wallbridge v. Martin*, 2 Ch. Ch. 275, I am of the opinion that there was not any necessity for making the companies through whom the plaintiffs claim parties to that suit, and I am of the opinion that their not proving a claim in that suit, and it being reported as stated in the answer of the defendant Worswick, affords no bar to the plaintiffs' maintaining this suit. The claim was not foreclosed or in any manner barred, so far as I can see, by the proceedings in that suit.

As to the suit brought by the Goderich Foundry and Manufacturing Company, in which they obtained a decree, I do not see how the contention of the defendants can be successful. The same relief that is asked in this suit could not, in my opinion, have been obtained in that suit.

Much evidence was given in respect of the contention that there was an agreement between the two companies that the Goderich Foundry and Manufacturing Company should not have any lien. The burden of proving this alleged agreement was upon the defendants; and I am of the opinion that the effect of the evidence, verbal and documentary, is that this agreement has not been proved.

I do not see that I can give any effect to the contention based upon the proceedings in ejectment against Brodie (*b*). Even assuming that Brodie had been dispossessed and remained out of possession, which he did not, he would nevertheless have continued to be the owner of the equity of redemption in the premises, and a lien under the Act would attach upon his interest.

The plaintiffs proved the agreement between Brodie and the Goderich Foundry and Manufacturing Company. They proved that the work was done and the materials provided under this agreement. It was remarked by counsel for the defendants that it had not been proved that anything was due and owing for this work and materials, whereupon plaintiffs' counsel offered to prove this fact, if it were considered necessary. It was not in any way set up or argued that the work and materials had been paid for. There is no plea of payment for these on the record. The objection was not insisted upon, as I understood, by counsel, and I think I must find that the plaintiffs proved a subsisting lien upon the premises in their favor, and I think the plaintiffs are entitled to judgment; that they have and are entitled to a lien under the Act for the amount owing in respect of the work done and materials provided, and that in respect of this lien they are entitled to priority over the claim of the defendant Worswick on his mortgage, in respect of the increased value of the lands by reason of the improvements, namely, the work done and materials pro-

(*b*) These ejectment proceedings were thus referred to in the last paragraph of the answer of the defendant Worswick:—The Worswick Engine Company (limited), did in the month of February, 1878, take proceedings under their said mortgage in Her Majesty's Court of Queen's Bench for Ontario, to eject the said John Brodie from the lands and premises in question herein, and such proceedings were had therein that judgment was entered up in the said suit against the said John Brodie, and a writ of *hab. fac. poss.* was issued thereon, whereby the said John Brodie was dispossessed of the said lands and premises, and possession thereof was delivered by the sheriff of the county of Wellington to the Worswick Engine Company (limited), prior to the Goderich Foundry and Manufacturing Company (limited), doing any work or putting any machinery in the said premises."

vided. Reading the 7th section of the Act in the light afforded by the decision in *Broughton v. Smallpiece*, 25 Gr. 290, this would appear to be its meaning in regard to priorities as applicable to the present case.

Counsel for the plaintiffs asked to amend by claiming priority over the lien of the defendant Worswick. Defendants' counsel did not say that he was not ready to meet such an amendment, but he did not assent to its being made. I however do not perceive any good to arise from such an amendment, as it appears to me that each lien under the Act must stand upon its own footing, every lien-holder being entitled to security upon the enhanced value arising by reason of his work and materials. I think the plaintiffs are entitled to payment, with costs. The judgment can be settled in the light afforded by the case of *Downer v. Mix*, referred to in Mr. *Holmsted's* work, at page 67.

[CHANCERY DIVISION.]

STUART ET AL V. TREMAIN ET AL.

Fraudulent preference—Pressure—Innocent purchaser—R. S. O. ch. 118.

Where T., being then insolvent, transferred to A., one of his creditors, all his estate and effects, and it appeared that the impelling cause of the transfer was the application of A. to be paid or protected, and the present plaintiff, also a creditor, sought to set aside the said transfer as a fraudulent preference :

Semble, the transfer was not "voluntary" within R. S. O. ch. 118, and could not be set aside.

Before the present proceedings A. had transferred the said effects for value to a *bonâ fide* purchaser.

Held, that A. could not, in any event, be called on to make good the value of the goods, as if he were a debtor of the plaintiff.

THIS was an action brought by John S. Stuart and Thomas D. McPherson, against John G. Tremain and James Amey, seeking to have a certain transfer of personal property declared null and void on the ground of fraudulent preference.

By the statement of claim it was alleged that the plaintiffs were wholesale grocers, carrying on business in the city of Hamilton, Ont., and that the defendant Tremain formerly carried on business at the village of Listowel, as a retail grocer: that the plaintiffs, prior to March 24th, 1882, supplied goods to the defendant Tremain, to the extent of \$818.10, the price of which still remained due and owing, and the plaintiffs had recovered judgment for \$538.28, portion of such claim, and had placed executions in the hands of the sheriff of Perth, where Tremain carried on business: that about March 24th, 1882, Tremain being then insolvent, and desiring to give the defendant Amey, his brother-in-law, a preference over his other creditors, and with intent to defeat, delay, and hinder the plaintiffs and his other creditors, assigned, transferred, and set over to the defendant Amey, all his estate and effects, to wit, his stock in trade and book debts connected with his said business, leaving nothing whatever for the plaintiffs

or his other creditors ; but for the said transfer the plaintiffs might and would have been able to have made their said executions, which were the first in the hands of the said sheriff ; that Amey had obtained a fraudulent preference over the other creditors of Tremain ; and the plaintiffs submitted the said transfer was null and void : that the said goods, stock, and book debts were of the value of \$2,500 : and the plaintiffs sought to have the said transfer declared null and void ; and for an order for Amey to pay over to the said sheriff, not exceeding the value of said goods and debts transferred, sufficient to satisfy all executions in his hands against the goods of the said Tremain, in order of priority, or that he might be declared to hold the moneys realized from the assets so transferred in trust for the defendant Tremain, and might be estopped from setting up his own claim against the defendant Tremain (if any he had), in answer to any application to garnish the said moneys, and for an order for costs against the defendants.

The defendants put in a joint statement of defence merely denying and putting the plaintiff to proof of the allegations contained in their statement of claim.

It appeared in evidence that Amey sold the stock in trade transferred to a *bond fide* purchaser for value before the issue of the writ in this action.

The rest of the evidence adduced and the facts of the case sufficiently appear in the judgment.

The cause was heard at the sittings in London, on September 21st, 1882.

G. C. Gibbons, for the plaintiffs. There was no pressure here. The transfer to Amey was voluntary within R. S. O. ch. 118. I refer to *Davies v. Shields*, Patterson, J. A., Dec. 23rd, 1880. (a).

R. Smith, Q. C., for the defendant Amey. There was pressure here, sufficient to support the transaction: *Ex parte Hodgkin, in re Softly*, L. R. 20 Eq. 746 ; *Alton v. Harrison*, L. R. 4 Ch. 622.

(a). Not reported.

October 11, 1882. **BOYD, C.**—In my opinion the plaintiffs fail on several grounds. I do not think the transfer to Amey was voluntary in the sense in which that word is used in the statute R. S. O. ch. 118. The impelling cause which led to the transfer was rather the application of Amey to be paid or protected.

Apart from this, Amey having transferred the goods for value to a third person before the transaction between him and Tremain is impeached, cannot now be called upon to make good the value of those goods as if he were a debtor of the plaintiff. This attempt to make Amey account for the proceeds of the goods is entirely novel, and in my judgment its success would involve an unwarrantable extension of the law. The statute declares that the transfer by way of fraudulent preference shall be null and void as against the creditors of the transferor. That means, as is well settled, that the transaction is good as between the parties to it, and is voidable only at the election of creditors. Before this creditor, the plaintiff, is in a position to question the validity of the transfer, the goods have been *bond fide* alienated to a purchaser for value, against whom he has no relief. Under the statute, the plaintiff's remedy is to have any obstruction removed which impedes the operation of his writs of execution.

I do not see that the statute entitles him to any further relief, or indeed enables the Court to grant any. His pursuit of the goods exigible in execution, fails when a *bond fide* sale takes place. The effect of such a sale is clearly defined in *Morewood v. The South Yorkshire R. W. Co.*, 3 H. & N. 798; a case that has been followed by the Court of Appeal in *Totten v. Douglas*, 18 Gr. 341. This general question has been already somewhat considered by me in the case of *Davis v. Wickson*, 1 O. R. 369. The plaintiff having no lien upon the goods and no execution affecting them while in the hands of Amey, why should not Amey have the same power of disposition as to those goods as the original debtor? Can he not validly sell and hold the proceeds to his own use? Why should his receipt of the

proceeds invest him with the new character of being debtor to this plaintiff? Here, however, it is to be observed that the price of the goods sold never reached his hands, but was applied to pay part of what was due upon notes held by Hay & Scott, of which both defendants were the makers. Thus, in effect, the defendant Amey was a mere conduit whereby the value of the goods when sold was applied to satisfy the claims of others of Tremain's creditors. It would surely be a perversion of the object of the statute to give the plaintiffs a right to enforce payment over again of this fund for their benefit. The manuscript case cited of *Davies v. Shields*, (b) has no application for them, what was in question was a sum of money placed in the hands of creditors' assignees for distribution, but with illegal restrictions, which invalidated the assignment. No such difficulty arose as in the present case by the intervention of a holder for value without notice. Nor does the decision in *Charles v. Cousins*, 28 U. C. R. 509, help the plaintiff. That went explicitly upon the meaning given to language used in the Insolvent Act, the like of which is not to be found in the Fraudulent Preference Act. Whatever propriety there may be in enabling the official assignee to recover the proceeds of property parted with *in specie* before the fraudulent transaction is impeached, whereby distribution *pari passu* among all creditors will be secured, there would be no object in extending that remedy to the present case, where the plaintiff seeks the aid of the Court to give him a preference, to the exclusion of the general body of Tremain's creditors.

The action is dismissed, with costs.

(b) PATTERSON, J. A., December 3, 1880, not reported.

[CHANCERY DIVISION.]

KEITH V. FENELON FALLS UNION SCHOOL SECTION ET AL.

Municipal corporation—Public School Board—Principal and surety—Liability of a surety for Secretary-Treasurer—Construction of deeds—Mistake.

A municipal corporation passed a by-law for raising a loan to liquidate a debt to be incurred in enlarging the school-house in a Public School section, and providing for the issue of debentures for that purpose, and for levying a special rate to pay the interest thereon, and to create a sinking fund for payment of the principal; and the municipal authorities paid the moneys so raised by the said special rate to the Secretary-Treasurer of the School Board of the said section.

A., the Secretary-Treasurer of the School Board, and B., as his surety, gave a bond of office, reciting that A. had been appointed such Secretary-Treasurer, and that "it was required that security should be given for the due and faithful performance of any and all the duties pertaining to such office," and conditioned to "correctly and safely keep any and all moneys and papers belonging to the said School Board, and to faithfully and honestly deliver up, account for, and pay over any moneys which at any time thereafter might come into his hands and possession as such Secretary-Treasurer," and A. received and made default in respect of certain moneys improperly paid to him as such Secretary-Treasurer.

Held, that the condition must be read with reference to the recital, and its scope might be thereby restricted, and reading the two together B. was not liable for the moneys so received by A., which were outside the duties pertaining to his office, and should have been retained by the municipal corporation.

B. having been informed by the School Board that A. was in default, but not in respect of what moneys the default was made, as to which he made no enquiries, and having at the request of the School Board given a mortgage to secure the liability which he was informed he had, by reason of such default, incurred as surety under the above bond, and having subsequently ascertained that the default was partly in respect of moneys so improperly paid to A.: *Held*, that B. was entitled to redeem on payment of the balance only of the moneys for which he was held liable as surety, the mortgage having been executed under a mistake.

THE bill of complaint in this cause was filed by George Gall Keith, against the Public School Board of Union Section No. 3, Fenelon, Fenelon Falls and Verulam, William Jordan, Blake Orr, and Havilah Davis, seeking an account of what the plaintiff and his co-surety were liable to pay on a certain bond, and seeking also to be let in to redeem a certain mortgage, under the circumstances which appear in the judgment.

The cause was heard on December 15th and 16th 1881, at Toronto, before Ferguson, J. It was taken *pro confesso*

against the defendant Davis, and the defendant Orr being out of the jurisdiction, it was agreed that the case should go on without his being represented.

J. Maclellan, Q. C., and *Riordan*, for the plaintiff. It is clear that a large portion of the money in respect to which Davis is in default, is money that did not come into his hands legally. They were not the moneys of the school section at all. See R. S. O. ch. 204, sec. 78, sub-secs. 9, 10, 11; and secs. 79, 104, sub-sec. 10. Schedule B to the Act, p. 2115, provides for the form of the debentures. See also the original provision in 37 Vict. ch. 28, sec. 48, sub-sec. 2. See also R. S. O. ch. 174, secs. 355, *et seq.*, 363, 364. It was a breach of faith on the part of the treasurer of the corporation to pay the money over to the treasurer of the School Board. As an officer of the School Board, Davis had no duty to receive or hold the money. His duty was to pay it back to the corporation of the municipality.

S. H. Blake, Q. C., and *Barron*, for the defendants. Whatever Davis raised *virtute officii*, his surety was responsible for. Can there be any question that the Board could call the treasurer to account as to this money? The by-law seems to assume that the School Board had power to make a loan of money, which is material, as shewing what was the idea, and thereby giving a reason for the conduct in regard to the money. Take the words of the bond, this was school money, and was collected under a school-rate. It was received *virtute officii*: *Waters v. State of Maryland*, 1 Gill 302, 308; *The Supervisors of Rensselaer Co. v. Bates*, 17 N. Y. 242. An agent cannot question the validity of the conduct of his principal in obtaining the money which came to his hands; *Thompson v. Stickney*, 6 Ala. 579; *Wagner v. Commercial National Bank*, 52 Penn. 343; *Baby v. Baby*, 8 U. C. R. 76; *Corporation of Essex v. Park*, 11 C. P. 473; *Brandt on Suretyship*, 589; *Burge on Suretyship*, 49. I also refer to *Will v. James*, 7 M. & W. 279. From the evidence of Fielding, the plaintiff must have known what the deficit

was for. The mortgage admits that Davis was a defaulter. The act was not done rashly or improvidently when the plaintiff gave the mortgage. So long as time has been given, that is a consideration; *Frazer v. Locie*, 10 Gr. 207. The moneys were stamped as school moneys, because the school section comprehends the whole village and more. See also R. S. O. ch. 204, sec. 102, sub-sec. 3; sec. 104. The words of the bond follow sec. 102, sub-sec. 3.

J. Maclellann, Q. C., in reply. What was the indulgence we received? We were to pay on demand. We got nothing but the privilege of giving security. A person who has given a mortgage may always show that it was given for too large a sum. If the plaintiff proves there was a mistake in the amount of the mortgage, that is all that he has to do here. If even the principal debtor who had all the means of knowledge could shew the mistake, he could have the mortgage reformed. The plaintiff never saw the account; he simply believed the statement of others. No time was given to the plaintiff, the mortgage was payable on demand. At the time the plaintiff gave the mortgage, he did not know of the items. The question does not depend upon whether the officer was liable to the principal or not; the creditor and debtor cannot enlarge the liability of the surety. The money in question was not in any sense school money. See R. S. O., c. 204, s. 104, sub. sec. 10. The law does not contemplate that any School Board should have a sinking fund. The functions of the Board are defined and limited by statute, as are also those of the treasurer. The security is taken in respect of the duties to be done by the School Board. The cases cited by Mr. Blake depend upon the particular facts, and are not applicable here. Apply the extreme case, and no matter what business the Board might carry on so long as the money went into the treasurer's hand nominally as treasurer, the plaintiff would be liable if the defendant's contention is right.

October 15, 1882. FERGUSON, J.—On and prior to the 1st May, 1878, the defendant Davis was the secretary-treasurer of the defendants, the Public School Board of Union School Section No. 3, Fenelon, Fenelon Falls and Verulam; and on that day the defendant Davis as principal, and the plaintiff and the defendant Orr as sureties, by their bond, became jointly and severally bound to the defendants, the School Board, in the penal sum of \$1,500, for the due performance by the defendant Davis of the duties of his office as such secretary-treasurer. Davis continued in the office till the 18th March, 1880, when it was said that he was a defaulter. The plaintiff in his evidence says that he lives some twelve or fourteen miles from Fenelon Falls; that he was accidentally at the Falls and heard that Davis was in difficulty; that he went to see Davis, who told him the school moneys were not "all right," and that he did not know how much he was in default. There was a meeting of the board the evening of the same day. The plaintiff was at this meeting by invitation; and he says he was told, not saying by whom, that whatever sum Davis was in default he should have to make good. It appears that before this time the co-surety, Orr, had left the country. At this meeting another meeting was arranged for. The second meeting of the Board was a full one, the whole six members being present. The plaintiff was there by appointment, and Davis was also there. The plaintiff says that at this meeting Mr. Fielding, the Chairman of the Board, called him forward to the table and told him that the amount in which Davis was in default was \$1,444.15, and that he, the plaintiff, would have to make it good. The plaintiff said then that he hoped the Board would give him the easiest possible terms. He says the Board then said they must have security; that he should either pay the money, allow judgment against him by default, or give a mortgage on his property. Davis was present when it was asserted that \$1,444.15 was the amount of his defalcation, and he assented to that as being the correct sum. Fielding says that the plaintiff was

present then, and he has no doubt that he heard all that passed ; that he was near enough to hear, &c.

No statement or account respecting Davis's transactions was shown the plaintiff, and he says he took it "for granted" that the amount mentioned was correct. There is evidence showing that the plaintiff is a shrewd man, though not having much learning or education. The plaintiff says he thought the mortgage the best way for him, and that an agreement was arrived at that a mortgage should be given to Jordan in trust for the Board. He says Davis was present and made no objection to the amount. The plaintiff, pursuant to the arrangement, went to Lindsay and executed the mortgage. He says the "whole thing" was done in a few days, and that he has never yet been shown and has not seen any account, by which I have no doubt he means any account shewing the receipts and disbursements or payments of money by Davis. The mortgage is for this sum of \$1,444.15, payable on demand without interest.

The school section represented by this Board, is composed of the village of Fenelon Falls, part of the township of Fenelon, and a part of the township of Verulam. In the year 1876, a by-law was passed by the municipal council of Fenelon Falls, to raise by way of loan the sum of \$2,500, to liquidate a debt then to be incurred for the purpose of enlarging the school house in the school section.

This by-law provided for the issue of the debentures of the village of Fenelon Falls, to an amount not exceeding the \$2,500, in sums not less than \$100, payable to bearer in ten years, with interest at eight per cent. per annum, and for coupons in the usual way. It also provided for the levying of a special rate to pay the interest, and to create a sinking fund for the payment of the debt. The annual sum for interest was \$200, and the annual amount for sinking fund was \$250. The by-law does not seem to have been very skilfully drafted. The debentures were, however, issued and negotiated, and the money applied in the enlargement of the school house. These

debentures were, there can be no reasonable doubt, in the form given by the statute. They were the debentures of the municipal corporation, and the moneys raised by the special rate to pay the interest upon them, and to provide a sinking fund for the payment of them at the end of the ten years, were, I think, moneys of the municipal corporation, moneys to be received, taken care of and paid, as the case might be, by the municipal corporation.

The witness, Fielding, however, says that during the years 1877, 1878, 1879, and 1880, the School Board made requisitions upon the municipal corporation for this annual sum of \$450, the \$250 for sinking fund, and the \$200 for the interest; and that the municipal corporation, in response to these requisitions, paid these moneys to the defendant Davis; and a large part of his defalcation (about \$1,100 or about \$900 of it) was in respect of these moneys.

The plaintiff was sued upon the covenant contained in the mortgage, and, (as he says) having no defence at law, judgment was entered against him on the 4th day of October, 1880. An exemplification of the roll of this judgment is in evidence. It was, however, agreed that no use should be made of this judgment in the meantime, and until the disposition of this suit.

The plaintiff now says that at the time of the execution of the mortgage, he had not, nor had he up to the month of July, 1880, any notice or knowledge that any part of the defalcation of Davis was in respect of the moneys so received from the municipal corporation. He contends that he was not liable on the bond for that part of the default of Davis, and he asks to have the account opened and the true amount for which the sureties are liable on their bond ascertained; and amongst other things that he may be let in to redeem the mortgage, on payment of what is justly due, &c. (a.)

(a) The school board put in an answer, in which they denied that any untrue representations were made to the plaintiff, or that he was in any way misled, and otherwise put the plaintiff to proof. The defendant William Jackson also put in an answer to the same effect, and also submitting that he acted as trustee only, at the request of the school board, and asking that his costs of suit might be paid.

Fielding, in his evidence says: "The plaintiff is a poor writer. He can keep his accounts; he is a poor accountant; he has been a blacksmith; he was at the time satisfied that the amount was correct. I think every body there knew that the debenture money was in the account. I think the plaintiff knew this. If he denies it on his oath, I suppose what he says must be true." The plaintiff does deny it, and I am of the opinion that the plaintiff was not aware that the defalcation spoken of was composed in part of these moneys that are called the "debenture moneys," and I think this the proper finding on the evidence.

At the trial there was much contention between counsel as to the meaning of the condition of the bond. Counsel for plaintiff contending that it had reference only to such moneys as were legally and properly paid to Davis, or legally and properly came into his hands as such secretary-treasurer. Counsel for defendants on the other hand, contending that it had reference to all moneys received by Davis by virtue of his office—*virtute officii*—and that the condition, properly construed, embraced the "debenture moneys," because he received them by virtue of his office; that is, as nearly as I understood the idea, that the moneys were received by Davis by virtue of his office, because he would not and could not have received them had he not been the holder of the office.

The words of the condition so far as they are material here, are, "do correctly and safely keep any and all moneys and papers belonging to the said School Board, * * * and do faithfully and honestly account for the receiving and disbursing by him of all school moneys collected by school rate, rate bill, subscription, or otherwise, from the inhabitants or rate-payers of the said school section or other parties; and do faithfully and honestly disburse any and all moneys as he may legally be required so to do by the said public School Board; * * * and do faithfully and honestly deliver up, account for, and pay over any and all books, papers, documents, writings, or chattels,

moneys, or valuable securities, which at any time hereafter may come into his hands and possession, as such secretary-treasurer."

The recital in this bond is very short, and is in these words "Whereas, the above bounden Davis has been appointed and now is the secretary-treasurer of the said public School Board; and it is required that security should be given for the due and faithful performance of any and all the duties pertaining to such office."

Now, if there is any difference in breadth of meaning between the words employed in the condition and those in the recital—and I do not say that there is—I think the language of Lord Ellenborough, in the case of *Parker v. Wise*, 6 M. & S. at p. 247, applies where he says "I adopt to their full extent the positions on which the learned counsel rests his argument in support of this plea, that a surety ought not to be bound beyond the scope of his engagement, and that this is to be sought out from the whole context taken together, and that the decisions from *Lord Arlington v. Merricke*, to the last case cited, agree that the condition shall be taken with reference to the recital, and may be explained and restrained by it."

In the second volume of Wms. Saunders, ed. of 1871, in the notes to *Lord Arlington v. Merricke*, p. 813, many cases on the subject of conditions in bonds are collected, *Parker v. Wise*, being one of them.

Now, looking at the recital and the condition taken together, I think it cannot be fairly said that moneys received by the officer outside of the duties pertaining to his office, are within the scope of the surety's engagement: and I am of the opinion that it was not a part of the duties pertaining to the office of Davis to receive the moneys called the debenture moneys, to receive and pay over the interest, or to receive and be the custodian of the moneys of the sinking fund, some of them for a period of nine or ten years; and I think the sureties were not liable for a default in respect of these moneys.

Then I think the conduct of the plaintiff has not disen-

titled him to relief. He executed the mortgage, but he did so under a mistake as to a most important fact, as important as the one in *Gooderham v. Bank of Upper Canada*, 9 Gr. 39. If the money had been paid under such a mistake of fact, I think it could be recovered back; and I do not see any good reason why the plaintiff should not have relief. I do not think effect can be given to the argument that there was an extension of time constituting a consideration for the mortgage. I think there should be an account to ascertain the extent of Davis's default, apart from the moneys that have been called the debenture moneys, unless the parties can agree as to the amount; and that the plaintiff should be permitted to redeem. There should be no further proceeding in the action at law. He does not ask larger relief. The relief asked against the co-surety cannot, of course, be granted under the circumstances.

As to the costs, the plaintiff should pay the defendants' costs, I think.

[CHANCERY DIVISION.]

GILLIES ET AL. V. McCONOCHIE.

Will—Charitable bequests—Uncertainty.

A testator, a minister of the United Presbyterian Church of North America, after bequeathing \$1,000 to the said Church, proceeded as follows : " I give for a Jewish Mission \$1,000 to that church which is sound and evangelical in doctrine and pure in worship, using the songs of praise, the inspired book which can unite all nations," &c.

The evidence showed that this description applied to the said church :

Held, not void for uncertainty, for that the testator clearly intended the said Church as the legatee.

The testator then proceeded thus : " To the pious poor converted Jews that meet together for the reading of the scriptures for their instruction and mental edification I leave \$1,000 : "

Held, a good charitable bequest and not void for uncertainty.

Lastly, the testator gave " the balance " of his estate " to the poor and destitute, to supply their wants in food and raiment : "

Held, a valid bequest so far as the residue consisted of personalty, and an inquiry directed to guide the Court in the application of the fund.

THIS was an action by the executors of the will of Thomas Hannay, for the construction of his will, to declare the effect of the legacies contained in it; for the opinion, advice, and direction of the Court respecting the administration of the testator's assets; and for further relief.

The defendants were some of the heirs-at-law and next of kin of the testator, his widow, the trustees of the General Assembly of the United Presbyterian Church of North America (claiming to be legatees under the will), and the Attorney-General for Ontario.

The will was short, and in the following terms :

" This is the last will and testament of me, Thomas Hannay, of the village of Williamsford, in the county of Grey, and Province of Ontario, Minister of the Gospel, made this seventh day of May, A. D. 1881.

" I revoke all former wills or testamentary dispositions by me at any time heretofore made, and declare this only to be and contain my last will and testament.

" I direct all my just debts, funeral and testamentary expenses to be paid and satisfied by my executors herein-

after named as soon as conveniently may be after my decease.

"I give, devise, and bequeath all my real and personal estate of which I may die possessed in the manner following, that is to say: To my dear wife, Catharine Hannay, the sum of \$1,000, also all my books and household furniture.

"Secondly—I leave to the General Assembly of the United Presbyterian Church of the United States of America the sum of \$1,000.

"Thirdly—As the time for the fulfilment of prophecy in the conversion of the Jews is now speedily approaching, I give for a Jewish mission the sum of \$1,000, to that church which is sound and evangelical in doctrine and pure in worship, using in songs of praise the inspired book which can unite all nations, Jews and Gentiles, in all ages in singing with their voice together to the glory, honour, and praise of God.

"Fourthly—To the pious poor converted Jews that meet together for the reading of the scriptures for their instruction and mutual edification I leave \$1,000. To my executors I allow the sum of five per cent. on my whole estate for their trouble collecting the same. The balance of my estate I leave to the poor and destitute to supply their wants in food and raiment.

"And I nominate and appoint Robert Gillies of, &c., John Elliot of, &c., and John Thompson of, &c., to be executors of this my last will and testament."

The will was duly executed in the presence of two witnesses.

The effect of the evidence adduced is sufficiently stated in the judgment.

The cause was heard at Owen Sound, on September 25th, 1882, before the Hon. Mr. Justice Proudfoot.

D. A. Creasor, for the plaintiffs.

G. H. Galbraith for the heirs-at-law. We do not object to the legacy of \$1,000 to the General Assembly of the United Presbyterian Church. But we claim that the third

and fourth bequests and the gift of the residue to the poor and destitute are all void for uncertainty: *Ommaney v. Butcher*, T. & R. 260; *In re Jarman's Estate*, *Leavers v. Clayton*, L. R. 8 Ch. D. 584. If the third and fourth bequests are void they do not fall into the residue so as to pass to the poor under the residuary bequest, for only the balance is to go to the poor and destitute after the other gifts are provided for: *In re Jeaffreson's Trusts*, L. R. 2 Eq. 276; *Green v. Pertwee*, 5 Ha. 249; *Easum v. Appleford*, 10 Sim. 274; *Nesbett v. Murray*, 5 Ves. Jr. 149; *Gibson v. Hale*, 17 Sim. 129. The doctrine of *cy pres* does not apply to personalty, nor to a mixed fund: *Routledge v Dorril*, 2 Ves. Jr. 356.

John Creasor, Q. C., for the widow of the testator. The third and fourth bequests are void, but the gift of the balance is good: 1 *Jarman on Wills*, 4th ed., 208; *Pocock v. Attorney-General*, L. R. 3 Ch. D. 342. As to the impure personalty, there is an intestacy. We claim the legacy of \$1,000 and half the personalty undisposed of.

S. Platt, for the United Presbyterian Church of North America, as to the third bequest, cited *Theobald on Wills*, 1st ed., 109-111.

No one appeared for the Attorney-General.

The following cases were also referred to on the argument: *Anderson v. Kilborn*, 13 Gr. 219; *S. C.*, 22 Gr. 385; *Fulton v. Fulton*, 24 Gr. 422; *Stewart v. Gesner*, 29 Gr. 329.

November 8th, 1882. PROUDFOOT, J. [after stating the facts].—The evidence shewed that the testator was a minister of the United Presbyterian Church of North America, which is incorporated under a statute of the State of Pennsylvania, and has its chief field of operations in the United States, but has a Presbytery in Ontario. The testator attended the meetings of the church courts of this body when able to do so; and I have no doubt that the bequest in the will, "to the General Assembly of the United

Presbyterian Church of the United States of America," was intended to be given to that body, and they are entitled to it if in other respects the legacy is valid: *Boyle on Charities*, 130.

The will includes the real and personal estate in one clause, apparently forming a mixed fund from which the gifts in the will were to be made. The executors, it is said, have paid all the debts and funeral and testamentary charges, and have more than enough of pure personalty in hand to discharge the specific legacies. There is no power of sale over the lands given to the executors, and there is no devise of the lands to them. The legacies are probably all charged on the whole estate, and possibly the executors might have power under R. S. O., c. 107, sec. 19, to dispose of the lands. But the difficulties arising from the bequest of charitable legacies out of a mixed fund where the personal estate is deficient do not arise here, as there is sufficient of pure personalty to pay the specific bequests. The true construction of the will, I think, is, that these specific bequests are to be paid out of the pure personalty, and that the impure personalty and the lands, together with the balance of the pure personalty, form the residue given by the residuary clause.

So far as the residue consists of impure personalty and lands, the gift to the charity is void, and the heirs-at-law and next of kin are entitled to it, according to the nature of the subjects of which it is composed.

The legacy to the United Presbyterian Church of North America is therefore valid.

The next legacy for a Jewish mission, given to "that church which, &c.," is intended as a gift to the same United Presbyterian Church for such a mission. The testator had just given a legacy pure and simple to that church, and he then gives the one now in question to "that church which, &c." The description he proceeds to give was shewn in evidence to apply to that church, which he considered sound and evangelical in doctrine, devotedly attached to using in songs of praise the inspired book; a description

which it was said by the witnesses could only apply to one other body, the Reformed church. There can be no doubt that the testator intended the church with which he was himself connected. The United Presbyterian Church of North America, in its statement of defence, however, only claims the simple legacy of \$1,000; and it does not appear if that body has a mission to the Jews, or if it is willing to apply the legacy for that purpose. These matters must form the subject of inquiry before the Master.

The fourth bequest, to the pious poor converted Jews, &c., was said to be void for uncertainty. I think it a good charitable bequest, not more vague or uncertain than many to be found in the books. Thus bequests for the promotion of the Protestant religion; or for the advancement of the Christian religion among infidels; *Attorney-General v. Virginia College*, 1 Ves. Jr. 243: and for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit; *Whicker v. Hume*, 7 H. L. C. 124: and to such religious or charitable societies as, in the judgment and discretion of the trustees require it; *Anderson v. Dougall*, 13 Gr. 164: and to the support of Christianity throughout the world, such as bible, tract, missionary societies, and institutions of learning of the Baptist denomination; *Anderson v. Kilborn*, 13 Gr. 219, 22 Gr. 385, have all been held to be valid charitable bequests. There will have to be an inquiry if any such pious converted Jews are to be found.

I may also say with regard to these two bequests, for a mission to the Jews, and to pious poor converted Jews, that if the United Presbyterian Church of North America will not accept the former, (*Boyle on Charities*, 174,) and if no such pious poor Jews can be found, that the Court will administer the funds *cy pres*. In *Anderson v. Dougall*, *supra*, Vankoughnet, C., says: "When the devise or bequest is for purely charitable objects and none other, the objection of uncertainty does not lie. The Court, if necessary, will seek out fitting objects, that the intended charity may not be disappointed; and this is an exception to the general

rule on the doctrine of uncertainty. A devise for charitable purposes simply is good." And in a more recent case it is decided that uncertainty as to the precise objects will not defeat the gift, if the general charitable intent is clear; and the Court will execute such general intent *cy pres*: *Mayor of Lyons, &c. v. Attorney-General, &c.*, 1 App. Ca. 91. And in this last case it was also decided that where the residue was given in charity the prior gifts in charity that failed or became ineffectual did not, in the absence of an express direction, fall into the residue, but would each be administered *cy pres* independently: and in one case, where the residue was given to three charities, one of which failed to take effect, its share was applied *cy pres*, and not to the others: *Ironmonger Co. v. Attorney-General*, 10 Cl. & F. 908.

The gift of the residue to the poor and destitute, to supply their temporal wants in food and raiment, is also a valid bequest so far as the residue consists of pure personalty. Such an indefinite bequest will, however, require to be confined to some determinate objects. An inquiry must be made to guide the Court in the application of the fund. It will be proper to inquire if there are any poor in the congregation of which the testator was pastor who need such assistance, or if he had any poor relations, of whom some mention was made in evidence: *Boyle on Charities*, 172.

There may perhaps be some doubt whether the administration of these indefinite charities lies with the Court, or with the Crown. It is said that to give the Court jurisdiction it is absolutely necessary that there should have been an appointment, or at least an intended appointment, of trustees. In *Moggridge v. Thackwell*, 7 Ves. 83, Lord Eldon held, that where the bequest is to trustees for charitable purposes, the disposition must be by a scheme before the Master; but where the object is charity without a trust interposed, it must be by sign manual. The trust here spoken of, however, may be either express, or that which arises, where the subject of the gift is personal

estate, from the appointment of executors; *Mills v. Farmer*, 19 Ves. 483, *S. C.*, 1 Mer. 55: *Boyle* on Charities, 240. In the present case there is no express appointment of trustees, but executors are named, and it is their duty to carry out the testator's will by paying his legacies: it would seem, therefore, that the administration must be by a scheme before the Master.

Had I come to a different conclusion some nice questions might arise as to whether the Attorney-General for Ontario or the Attorney-General for the Dominion were the proper party.

There will be declarations accordingly, and the necessary accounts of the estate will be taken and inquiries made. Costs and further directions reserved.

[CHANCERY DIVISION.]

MILLER V. BROWN.

Statute of Limitations—Acknowledgment of title—Retrospectivity of Registry Acts—Mortgages—Right to consolidate—R. S. O. ch. 108, sec. 19,—R. S. O. ch. 111, sec. 81.

Where a mortgagee in possession wrote, in 1871, to the holder of the equity of redemption as follows: "The amount due me in November, 1853, on your mortgages was as follows," (stating the amounts.) "No part of that sum has since been paid to me, but the rents I have received have nearly kept down the interest:" *Held*, a sufficient acknowledgment of title to give a new starting point to the Statute of Limitations from the date of the letter.

Where two mortgages on different properties by the same mortgagor came into C.'s hand before the Registry Act of 1865, and the mortgagor, after the passing of the said Act, assigned the equity of redemption to M. by a registered instrument: *Held*, on M.'s suing for redemption, that the registered conveyance to M. prevailed, under sec. 66 of the said Act, over C.'s equitable right to consolidate the two mortgages. The Registry Act of 1865, sec. 66, and the Registry Act of 1868, sec. 68, are retrospective.

THIS was an action by Robert Bell Miller, plaintiff, against Charles Brown, Elizabeth O'Brien, Ellen Madeline De Bernier Cameron, and Humphrey Lloyd Hime, defendants, for the recovery of certain lands, under the following circumstances:

In June, 1876, the plaintiff instituted an action of ejectment, against the defendant Brown, and claimed title under a mortgage made by Dugald Hunter to the Hon. Peter McGill, and also a deed from D. Hunter to the plaintiff, and also a deed from Paul Campbell to the plaintiff.

The defendant claimed title in himself, by length of possession in himself and those under whom he claimed; and also claimed title to the premises upon equitable grounds, under an agreement to purchase made in writing between the Hon. J. H. Cameron, who was mortgagee thereof by virtue of a mortgage made December 18th, 1850, by D. Hunter to A. Cruickshank, and assigned by Cruickshank to him, which agreement was made in pursuance of a power of sale in the mortgage, after default in payment and by way of assignment of said mortgage.

By an order of the September 8th, 1879, the cause was transferred to the Court of Chancery.

The premises in question were the north half of lot 13, on the east side of Church-street, in the city of Toronto.

After the transfer of the suit to the Court of Chancery, the plaintiff filed a supplemental statement and claim, wherein he stated that D. Hunter granted the premises to him, by indenture dated July 22nd, 1852, subject only to two mortgages thereon, one made by D. Hunter to the Hon. P. McGill, securing £100 and interest, and the other by D. Hunter to Alex. Cruickshank, dated December 18th, 1850, securing £300 and interest; that the plaintiff paid off the mortgage to the Hon. P. McGill, and paid a large sum on account of the mortgage to Cruickshank, which had been assigned to the Hon. J. H. Cameron on June 12th, 1851, and afterwards, in 1862, Cameron went into possession of the lands and into the receipt of the rents and profits, by means of which the sum remaining unpaid on the mortgage so assigned to Cameron had been paid long before the commencement of this suit; that the defendant Brown asserted that when the plaintiff became the purchaser the said Cameron was the holder of another mortgage upon lands in the township of Reach, made by D. Hunter and that Cameron was entitled to consolidate the two mortgages and insist upon holding both the mortgaged premises until the money secured by both was paid off; but the plaintiff shewed that when he became the purchaser of the lands in question in this suit, and received his conveyance, he had no notice or knowledge of the existence of the mortgage upon the premises in Reach, and the title to the lands in question was a registered title, and that by virtue of the registry laws he was protected against such alleged right; and claimed the benefit of the registry laws.

The plaintiff also claimed that if Cameron and the defendant Brown, his assignee, had the alleged right, the Reach mortgage had been paid by the receipt of the rents and profits of the lands in question in this suit; but if still liable to pay anything, the plaintiff offered to redeem.

The defendant Brown, by his answer, stated his contract with Cameron in January, 1869, for purchase: that he discovered that Cameron was not the beneficial owner, but trustee for Mrs. E. O'Brien: that on May 3rd, 1851, Cruickshank and Hunter mortgaged the Reach lands to A. McDonald, who on January 17th, 1852, assigned the mortgage to Cameron: that on December 18th, 1850, D. Hunter mortgaged to Cruickshank the land in Toronto, who, on June 12th, 1851, assigned the mortgage to Cameron. That Cameron and himself had been in possession of the premises after default, and that no acknowledgment of title had been given, and that neither D. Hunter nor the plaintiff had been in possession for 20 years, and the defendant claimed the benefit of the Statute of Limitations: that Cameron had a right to insist on the consolidation of the mortgages: and if the possession of himself and Cameron did not extend over more than ten years, the defendant claimed the benefit of the Statute of Limitations, 38 Vict. ch. 14.

On June 28th, 1880, the Chancellor made a decree for redemption by the plaintiff of the property in Toronto on payment of the money due in respect of the mortgage thereon, and directed the Master to make E. O'Brien and the representative of Cameron defendants to this suit in his office.

On October 29th, 1880, the Master made an order, upon service of which these persons were to be made parties to the suit. The order was served on November 5th, 1880.

On March 15th, 1882, an order was made on the petition of E. O'Brien and the representative of Cameron allowing them to put in an answer in the cause.

They put in their answers accordingly, setting up practically the same defences as had been set up by Brown,—that the plaintiff was barred by the Statute of Limitations, or if not, that he could only redeem on payment of what was due on both mortgages.

The rest of the facts of the case sufficiently appear from the judgment.

The case was heard at Toronto, on November 6th, 1882, before Proudfoot, J.

C. Moss, Q. C., and W. Barwick, for the plaintiff. The two main questions are, is the Statute of Limitations a bar in this case, and is there any right to consolidate the two mortgages? Cameron's letter of May 11th, 1871, is an acknowledgment of title: *Trulock v. Robey*, 12 Sim. 402; *Stansfield v. Hobson*, 16 Bea. 236, S. C. in App. 3 D. M. & G. 620; R. S. O. ch. 108, sec. 19. There is no right to consolidate the two mortgages here: *Brower v. Canada Permanent Building Association*, 24 Gr. 509; *Beevor v. Luck*, L. R. 4 Eq. 55; *Jennings v. Jordan*, L. R. 6 App. 698.

S. H. Blake, Q. C., and G. Morphy, for the defendants. The defendants have a right to rely on the consolidation of the mortgages. The letter of May 11th, 1871, is not an acknowledgment of liability, or an admission of title, so as to prevent the bar of the statute. The receipt of rent which has taken place has not been enough to stay the running of the statute, and the admission of such receipt does not: *Sanders v. Sanders*, 29 W. R. 413; *Workman v. Robb* 7 A. R. 389; *Harlock v. Ashberry*, L. R. 19 Ch. D. 543. Besides this letter does not say that in 1871 Cameron was a mortgagee, but that he was so in 1853. On this part of case we refer to *Cockburn v. Edwards*, L. R. 18 Ch. D. 449; *Union Bank of London v. Ingram*, L. R. 16 Ch. D. 53; *Chinnery v. Evans*, 11 H. L. C. 129, cited 19 Ch. D. 545; *Watson v. Lindsay*, 6 A. R. 609. As to the question of consolidation of the two mortgages. Registration has no effect on the question. The Registry Act in question was passed in 1868, and could not defeat a vested right. It would not have a retroactive effect. The plaintiff has not the legal estate, but only an equity, and the equity of the defendants O'Brien, and the representatives of Cameron, is earlier and should prevail. On this point we cite *Jennings v. Jordan*, L. R. 6 App. 698; *Harter v. Colman*, L. R. 19 Ch. D. 630; *Brewer v. Canada Permanent Building Association*, 24 Gr. 509; *McDonald v. McDonald*, 14 Gr. 153.

C. Moss, Q. C., in reply. The Registry Acts of 1865, sec. 66, 29 Vict. ch. 24 C. and 1868, sec. 68, 31 Vict. ch. 20, are retrospective: *Bell v. Walker*, 20 Gr. 558; *Haynes v. Gillen* 21 Gr. 15, (a).

S. H. Blake, Q. C. Bell v. Walker, and *Haynes v. Gillen* decide nothing except that a person acquiring an interest subsequent to the Act, could claim the benefit of the Act.

December 16th, 1882. PROUDFOOT, J. [After stating the above facts]. The decree of the Chancellor determined nothing against these defendants made parties subsequent to the decree. At the hearing the only defendant was Brown, and he was interested in the Toronto property alone; and no decision could be binding on those who were not parties. But the Chancellor does not appear to have intended deciding anything against them, for he directs them to be made parties, which involved the right of setting up any defence available to them.

As to the defence of the Statute of Limitations, it appears that Cameron went into possession after July 24th, 1861. A letter written by him to the plaintiff, written on May 11th, 1871, is relied upon as an acknowledgment of title under R. S. O. ch. 108, sec. 19. The letter is as follows:—

“TORONTO, 11th May, 1871.

DEAR MILLER,—The amount due to me in November 1853 on the Hunter mortgages was as follows :

First Mortgage.....	£112 10 0
Interest.....	10 2 6
Second Mortgage.....	450 0 0
Interest.....	64 10 0
Insurance.....	36 0 0
	<hr/>
	£676 2 6

No part of that sum has since been paid to me, but the rents I have received have nearly kept down the interest.

Yours truly,

R. B. Miller, Esq.

J. HILLYARD CAMERON.

Cameron knew that Miller was the owner of the equity of redemption of the Toronto land, and the letter was therefore written to the person entitled to redeem. It is an acknowledgment that Cameron is a mortgagee, and although the amount is stated to have been due in 1853, it admits the debt to be subsisting in 1871, though the rents had nearly kept down the interest.

I think this is a sufficient acknowledgment of title, and gives a new starting point from which the statute is to run.

Mrs. E. O'Brien and the representatives of Cameron became parties upon the service of the Master's order on November 5th, 1880, and within ten years from the acknowledgment of title, so that whether the twenty years or the ten years limitation is to rule, the plaintiff is within it.

As to the right to consolidate. At the time the mortgages got into Cameron's hands I apprehend there can be no doubt that he could hold both till both were paid, the equitable right to consolidate being incapable of registration, and therefore not affected by the registry laws; *McMaster v. Phipps*, 5 Gr. 253; *Brewer v. Canada Permanent Building Association*, 24 Gr. 509, 512. But under the Registry Act of 1865, (C.) sec. 66, and the Registry Act of 1868, (O.) sec. 68, no equitable lien, charge, or interest affecting land, is to be valid against a registered instrument executed by the same party. The title here is a registered one, and the equity was against Hunter, who executed the deed to the plaintiff, and there is no pretence that the plaintiff had then any notice of the Reach mortgage.

It does not seem to me to be necessary that the plaintiff should be the owner of the legal estate, to claim the benefit of the registry laws. He has an equitable estate by an instrument that was capable of registry and was registered.

The question then is, whether this clause is retrospective so as to effect equities existing before it was passed. There is much force in the reasoning of Mowat, V. C., in *McDonald v. McDonald*, 14 Gr. 133, where he held that the

66th sec. of the Registry Act of 1865, was not retrospective. But there are later cases which have decided otherwise. *Bell v. Walker*, 20 Gr. 558, was a decision of the full Court, and it was held that equities existing before the Act were rendered invalid by the Act. Blake, V. C., says: "It is said the registry laws do not apply, because the equity of the plaintiff had arisen before the passing of the Act, under which the defendant seeks protection. The first of these Acts, which was passed on the 18th September, 1865, did not come into force until the 1st January, 1876. Over two months were thus given in which to assert these rights, and after that period they were not to be deemed valid in any Court in the Province. It is clear this clause strikes at all such claims, no matter when they may have arisen. To hold otherwise would be to postpone for many years the full effect of this salutary enactment, without anything in the Act to warrant such a construction." And Spragge, C., says (p. 572): "I incline to agree that the Act 1868 applies to this case." And in *Gray v. Ball*, 23 Gr. 390, 394, the Chancellor again recurs to the question, and says: "Mr. Hodgins has contended that these Acts do not apply to equities existing prior to their being passed. I entirely agree with the observations of my brother Blake, upon that point, in *Bell v. Walker*."

The question is thus concluded by authority. And I therefore must hold, that the plaintiff is entitled to redeem the Toronto property alone, on payment of what is due on the mortgage of it; and as the defendants have denied the right to redeem at all, and if that be decided against them, only admit the right to redeem on terms that seem to me inadmissible, they must pay the costs of the hearing. There will be a reference to take the accounts, and the costs of the inquiry will follow the result.

[CHANCERY DIVISION.]

BLACK V. STRICKLAND ET AL.

Bill of exchange—Special indorsement—Special indorser suing as holder without reindorsement.

The possession of bills of exchange by the indorser, after he has specially indorsed them, is *primâ facie* evidence that he is the owner of them, and that they have been returned to him, and taken up in due course of time upon their dishonour, although there be no reindorsement; so that by the possession he is remitted to his original rights.

In July, 1877, W. drew a bill of exchange on the defendants, payable to his own order, and the latter accepted it. The bill was first specially indorsed to the Bank of O., which specially indorsed it for collection, to the Bank of C. It was dishonoured and protested, and came again into the hands of the Bank of O., which returned it to W. on or before December, 1877. Afterwards, but how did not appear, it got back into the hands of the Bank of O. In 1881 the plaintiff, who was W.'s agent, got it from the Bank of O., along with other papers of W., and W., in November, 1881, indorsed it to the order of the plaintiff, who now sued the acceptors. When produced the bill appeared with all the special indorsements struck out, leaving only the signature of W., to the first special indorsement, and with the last indorsement to the order of the plaintiff. There was no reindorsement from the Bank of O. to W. or to the plaintiff.

Held, (reversing the decision of FERGUSON, J., who had nonsuited the plaintiff,) that in the absence of other evidence it was to be inferred that W., had satisfied any claim of the Bank of O., and had thereby procured or had the right to make the cancellation of previous special indorsements.

Callow v. Lawrence, 3 M. & S. 95, cited and followed.

THIS was an action brought by Theodore Black, plaintiff, against Roland C. Strickland and Robert A. Strickland, defendants. By his statement of claim the plaintiff set out that one R. J. Whitla, on July 25th, 1877, drew a bill of exchange upon the defendants, trading under the name and firm of R. C. Strickland & Company, for \$488.88, payable to the order of the said R. J. Whitla, sixty days after date: that the defendants accepted the same: that the said R. J. Whitla indorsed the said bill to the plaintiff: that the said bill became due on September 26th, 1877, but that the defendants had not, either of them, paid the same or any part thereof; and the plaintiff claimed \$488.88 with interest at 6 per cent., from the maturity of the said bill until judgment, and protest charges.

By their statement of defence, the defendants admitted

the first two allegations of the plaintiff's claim, but amongst other pleas they denied that the said R. J. Whitla indorsed the said bill to the plaintiff, and they said that the plaintiff at the commencement of this suit was not the lawful holder of the said bill. The plaintiff by his reply joined issue on this plea of the defendants.

The action was tried at the sittings of this Court at Peterborough, on November 14th, 1882, before Ferguson, J. At the conclusion of the plaintiff's evidence, counsel for the defendants asked for a nonsuit, on the ground that the plaintiff was not the legal holder of the note. The learned Judge thereupon granted the nonsuit, and gave judgment for the defendants with costs, reserving leave to the plaintiff to bring another suit if so advised.

The evidence given by the plaintiff sufficiently appears from the judgment of Boyd, C., *infra*.

On December 9th, 1882, the plaintiff moved by way of appeal to the Divisional Court, before Boyd, C., and Mr. Justice Proudfoot.

R. M. Wells, for the appellant. The bill having got back into the hands of the drawer no re-indorsement was necessary by the special indorsees. The presumption is, that he has paid the indorsees and it has lawfully come back to his hands: *Dugan v. The United States*, 3 Wheat. 172; *Porter v. Cushman*, 19 Ill. 572; *Callow v. Lawrence*, 3 M. & S. 95; *Beck v. Robley*, 1 H. Bl. 89 n.; *Lazarus v. Cowie*, 3 Q. B. 459; *The Bank of the United States v. The United States*, 2 How. S. C. 711; *Elsam v. Denny*, 15 C. B. 87; *Edwards* on Bills and Notes, 3rd ed., vol. 1, p. 272, sec. 390; *Story* on Promissory Notes, 6th ed., sec. 246; *Dollfus v. Frosch*, 1 Denio 367; *Edgar v. Magee*, 1 O. R. 289.

S. H. Blake, Q. C., for the defendants. The cases referred to by the other side held a reindorsement unnecessary only where the special indorsee was merely agent of the endorser: *Story* on Bills 4th ed., sec. 209; *Dollfus v. Frosch*, 1 Denio 367. Here there was no such

relationship between them : *Edwards* on Promissory Notes, 3rd ed., sec. 389 ; *Chitty* on Bills, 168, 182 ; *Bayley* on Bills 120-1 ; *Gibson v. Minet*, 1 H. Bl. 569 ; *Clarke* on Bills, 54, 55. See also *Story* on Bills, 4th ed., secs. 201 and 209 ; *Mottram & Sons v. Mills*, 1 Sand, S. C. 37.

R. M. Wells, in reply, referred to *Story* on Bills, p. 611 sec. 452 ; *Edwards* on Bills, sec. 389 ; *Porter v. Cushman*, 19 Ill. 574.

February 15th, 1883. *BOYD, C.*—On July 25th, 1877, *Whitla* drew a bill of exchange on the defendants, payable to his own order, at sixty days, which they accepted but did not pay, and *Whitla* indorsed to the plaintiff, who sues for the amount of the bill, \$488, and interest from September 26th, 1877, when it was due.

Pleas denying indorsement to the plaintiff, and asserting that he was not the lawful holder, and others not now in question. The plaintiff was examined, and at the close of his evidence a nonsuit was entered.

It appeared that the note was at first indorsed "pay to the order of the Bank of Ottawa," which the witness said was put on, as he assumes, when *Mr. Whitla* discounted it, and before it was due. The Bank of Ottawa then indorsed it for collection to the Bank of Commerce at Peterborough. The plaintiff is *Mr. Whitla's* agent, and as such got the draft from the Bank of Ottawa in the spring of 1881, along with other papers of *Mr. Whitla*, who was then in Winnipeg. On the December 1st, 1877, *Mr. Whitla* proved a claim upon it against the insolvent estate of *R. C. Strickland*, one of the defendants, and had it then in his possession (after protest), and sent it to the assignee. How it got from the hands of the assignee back again to the Bank of Ottawa does not appear. After the bill came into the hands of the plaintiff, it was sent by him to Winnipeg, and it was then assigned to him by a separate instrument and also indorsed to him by *Mr. Whitla* about a year ago, (*i. e.*, November, 1881). It came back from Winnipeg as it now is (*i. e.*, as I understand, with the

special indorsements all struck out and leaving only the signature of Whitla to the first special indorsement, and with the last indorsement to the order of the plaintiff.)

The judgment gave effect to the objection made at the close of the plaintiff's case, that the plaintiff was not the legal holder of the note, as there was no re-indorsement from the Bank to Whitla or the plaintiff.

It appears that when the bill was dishonoured and protested it was returned by the Bank of Ottawa to Whitla on or before December, 1877. One would infer that it was afterwards left with the same bank for safe keeping, and it was handed out to the plaintiff as Whitla's agent in the spring of 1881, and afterwards indorsed to him by Whitla to enable this action to be brought. The case need not now be encumbered with a consideration of the insolvency proceedings, which may afford a defence if the plaintiff was wrongly nonsuited. If the bill was discounted by the Bank of Ottawa it was merely forwarded to the Bank of Commerce, as their agents, to collect; this failing, it would be returned in due course to the Bank of Ottawa. Upon their giving it back to Whitla it is to be assumed that their claim on it was satisfied. If it was not discounted by the bank, but merely left for collection, it would come back as of course to the hands of Whitla as the lawful owner. *Quâcunque viâ* it seems settled on the authorities that when the bill came back to Whitla, he was remitted to his original rights against the acceptor.

These are the words of Bayley, J., in a case which governs the present, of *Callow v. Lawrence*, 3 M. & S. 95. There Pywell drew on the defendant, payable to his own order, and the bill was accepted. While the bill was current, Pywell indorsed it to Taylor, who discounted it; and Taylor indorsed it to Burnett, who two days before it fell due paid it direct into his bankers. These indorsements to Taylor and to Burnett were evidently special indorsements. The bankers presented it for payment, and on its dishonour returned it to Burnett. Shortly after Pywell paid Burnett, who thereupon drew his pen

through his own and Taylor's indorsement, and handed back the bill to Pywell. This was in August, 1812. The bill was seen in the hands of Pywell in February, 1813, and afterwards he indorsed it to the plaintiff Callow, who then sued the acceptor. Lord Ellenborough, C. J., said : "A bill of exchange is negotiable *ad infinitum* until it has been paid, or discharged on behalf of the acceptor. If the drawer has paid the bill it seems he may sue the acceptor upon the bill, and if instead of suing the acceptor he put it into circulation upon his own indorsement only it does not prejudice any of the other parties who have indorsed the bill that the holder should be at liberty to sue the acceptor. Here Pywell the drawer became the purchaser of the bill when he paid and took it up out of Burnett's hands. The bill was not paid *animo solvendi* in order to extinguish it, but only to redeem himself from the situation in which he stood upon the bill; and the bill being indorsed by him, it is not necessary to its being negotiable that any other party should be prejudiced."

The language I have cited from Lord Ellenborough's judgment was adopted by the Court in *Hubbard v. Jackson*, 4 Bing. 390. The authority of the case was also recognized in *Williams v. James*, 15 Q. B. 498, and *Deuters v. Townsend*, 5 B. & S. 613.

The same results have been arrived at in the United States by a great consensus of authority, so that it may be accepted that the language of Story, J., in *Picquet v. Curtis*, 1 Sum. 478, correctly represents the generally received doctrine in that country. He there says that the possession of bills by the indorser after he has specially indorsed them is *primâ facie* evidence that he is the owner of them, and that they have been returned to him and taken up in due course upon their dishonour, although there is no reindorsement, so that by the possession he is remitted to his original rights. In *Mottram v. Mills*, 1 Sand. S. C. 37, the cases are elaborately reviewed; and it was held that the plaintiff's full indorsement of a bill to a subsequent indorsee remaining thereon uncanceled at

the trial, is no objection to his recovering on the bill against a first party, if he produces the bill as the holder; and that no retransfer or receipt from the subsequent indorsee need be proved to entitle him to recover. See also *Parsons* on Notes and Bills, 2nd ed., vol. 2 p. 30, and *Story* on Promissory Notes, 7th ed., sec. 452, and a case of *Bond v. Storrs*, 13 Conn. 412 in which *Callow v. Laurence* was acted on with the same result.

In *Chitty* on Bills, 11th ed., 275, the law is tersely summed up in these words: "If the drawer pays the bill at maturity, * * he may, in case he is payee, as well as drawer, re-issue the bill though overdue, so as to place the right of action in the hands of another."

In the absence of other evidence, it is to be inferred here that the drawer, Whitla, satisfied the claim of the Bank, "took up" the bill, and thereby procured or had the right to make the cancellation of the previous special indorsements. The objects for which the bill had been indorsed to the Bank were satisfied, and the special indorsements became inoperative upon the return of the instrument. The mere handing of it back was enough in these circumstances to make him the legal holder with the right to re-indorse to the plaintiff. See *Bank of Montreal v. Armour*, 9 C. P., 401. This having taken place after the bill was over due, it of course passes subject to all equities and defences that are available as against Whitla.

The judgment should be set aside, and a new trial, if desired by the defendant, ordered on payment of costs to plaintiffs; otherwise judgment should be entered for the plaintiffs with costs.

PROUDFOOT, J., concurred.

[CHANCERY DIVISION.]

HOPKINS V. HOPKINS ET AL.

Devise of rent to attesting witness—Statute of Limitations—Possession—25 Geo. II. ch. 6, sec. 1—R. S. O. ch. 108, sec. 5, sub-sec. 5—Ib., secs. 10, 11, 12, and 43.

A testator devised land, subject to a lease, to J. H. in fee, and as to the rent directed half to be paid to J. H., and half to the executor in trust for J. H. The executor, assuming the devise to be valid, paid all the rent to J. H. The latter executed a deed of the land to C. H., to whom he afterwards paid the rent with the privity of the executor, as soon as he received it from him. C. H. went into possession of the land after the expiration of the lease, and had been so receiving rent or in possession for more than ten years before action commenced. J. H. was a witness to the will.

Held, (affirming the decision of PROUDFOOT, J.,) that the devise of rent was void under 25 Geo. II. ch. 6, sec. 1, as J. H. was the beneficial devisee of the whole of it.

Rent issuing out of land is a tenement; it partakes of the nature of land, and is within the 5th section of the Statute of Frauds, and hence is also within 25 Geo. II. ch. 6, sec. 1.

Held, further, (also affirming PROUDFOOT, J.,) that the perception of the rent by the executor was from the outset "wrongful" within R. S. O. ch. 108, sec. 5, sub-sec. 5, and C. H. had acquired a good title by possession.

THIS was an action brought by Margaret Hopkins, the widow of one of the sons of Gabriel Hopkins, deceased, for a partition and sale of certain lands of which the said Gabriel Hopkins had died possessed, and to a certain share in which the plaintiff claimed to be entitled, both as such widow as aforesaid, and assignee of the shares and interests of certain of the next of kin of the said Gabriel Hopkins.

The defendants were Columbus Hopkins and other of the next of kin of the said Gabriel Hopkins, some of whom were infants.

The circumstances of the case are sufficiently stated in the judgment.

The plaintiff claimed that the lands in question should be partitioned or sold, and the proceeds thereof divided among the parties entitled thereto: that Columbus Hopkins might be declared a trustee of the said lands, and the rents and profits thereof received by him for the next of kin and heirs at law of the said testator, and that an

account of such receipts might be taken, and Columbus Hopkins ordered to pay the same, and for general relief.

The action was tried before Proudfoot, J., on October 26th, 1882, at the sittings of this Court at Hamilton.

W. Nesbitt, for the plaintiff. Everything in the will relating to Joseph Hopkins must be struck out. The executor collected the rents as executor, and held them in trust for those beneficially entitled : *Phillipo v. Munnings*, 2 M. & C. 309. The executor could not have said he acted as bailiff or agent for Joseph Hopkins : *Munsie v. Lindsay*, 1 O. R. 164.

A. Bruce, for the infant defendants. The devise of rent to the executor does not fail : it is valid, and gives him the land itself. I read the will as giving nothing to Joseph Hopkins, but all the rents to the executors. Columbus Hopkins has made out no case : *Jarman on Wills*, 5th Am. ed., vol. 2 p. 403 ; *Mannox v. Greener*, L. R. 14 Eq. 456.

E. Martin, Q. C., for the defendant Columbus Hopkins. Joseph Hopkins and Columbus obtaining the rent from the executor, must be treated just as if they had got it from the tenant. The residuary clause which is found in *Lister v. Pickford*, *supra*, is not found here, I refer also to *Thomas v. Thomas*, 2 K. & J. 79 ; *Lloyd v. Henderson*, 25 C. P. 253 ; R. S. O. ch. 108, sec. 10 ; *Ib.* sec. 5, sub. sec. 5 ; *Ib.* secs. 11 & 12.

Lazier, on the same side. The executor received the rents not as executor ; he received them and paid them over to Joseph Hopkins as being entitled to them. The statute began to run on Jan. 1st, 1862 ; R. S. O. ch. 108, sec. 43. The executor could not keep the rents for his own use. The possession here is clear and gives a good title. I also refer to *Ryan v. Devereux*. 26 U. C. R. 100 ; *Davidson v. Boomer*, 18 Gr. 475.

W. Nesbitt, in reply, the executor acted and paid the money over to the wrong party, this but does not confer title : *Lister v. Pickford*, 34 Bea. 589 ; *re Goff*, 8 P. R. 92. I also refer to *Gray v. Richford*, 2 S. C. R. 431.

November 8, 1882. PROUDFOOT, J.—Gabriel Hopkins died in April, 1861, having made a will on March 24th preceding, by which, among other things, he devised the land in question, about thirty acres, part of lot 11 in the first concession of East Flamborough, to his son Joseph during the term of his natural life, and to his heirs forever, the said bequest to be subject to the unexpired lease then held by Michael Duffield; and during the continuance of his lease one-half the rent payable by the said Duffield to be paid to his said son Joseph, the other half to be paid to his executor, to be by him lent out at interest, and principal and interest paid over to his said son Joseph as the said executor should think he might require it.

The lease referred to was made on December 10th, 1860, for a term of twelve years, from the 1st of January, 1861, to Michael Duffield, who occupied during the whole term, and paid the rent to the executor.

Joseph, the devisee, was one of three witnesses to the will, and the devise to him therefore was void: *Doe dem. Taylor v Mills*, 1 Moo. & R. 288; 25 Geo. II., ch. 6; R. S. O. ch. 106, sec. 17; *Crawford v. Boyd*, 22 Gr. 398.

The executor, however, assuming the devise to be valid, paid the rents to Joseph during the continuance of the lease. Joseph by deed dated January 7th, 1869, conveyed the land to the defendant Columbus Hopkins in fee, for the expressed condition of \$1,110; the true consideration being that Columbus was to support Joseph during his life time, which he did. Joseph died on the 12th of March, 1876. The executor knew of this deed, but did not wish to change the account in his books. After that deed was executed, Joseph accompanied Columbus to the executor when rent was to be got; the executor counted out the money, Joseph shoved it to Columbus, who put it in his pocket, and Joseph signed the receipt to the executor.

After the expiration of the lease to Duffield, Columbus went into possession, working the land part of the time, assisted by some other of the Hopkins family who lived

with him, and renting it part of the time. It was attempted to be shewn that the occupation was not that of Columbus alone, but the common occupation of him and others of the family but in my opinion the attempt failed, and I think that from the expiration of Duffield's lease, Columbus alone must be considered the occupant of the property. Columbus now claims title by possession.

The plaintiff contends that although the devise to Joseph was void, the direction to pay half the rents to the executor was good, and gave him the fee. An indefinite gift of the rents of real estate would no doubt confer a fee, if the gift were in other respects valid : *Mannox v. Greener*, L. R. 14 Eq. 456. But this is not such a gift ; it is only a direction that half of the rent was to be paid to the executor during Duffield's lease, and at the most would only have given him a chattel interest. And besides the fee is expressly given to Joseph. But both bequests or devises are, I apprehend, void under the very comprehensive language of the 25 Geo. II., c. 6 ; the rents to be received by the executor belonged beneficially to Joseph, and the gift was therefore avoided by the statute. I think, therefore, that there was an intestacy as to this land.

The writ in this case was issued on September 22nd, 1881.

There does not seem to me to be any appreciable distinction between this case and *Re Goff*, 8 P. R. 92, which was affirmed on appeal. In both there was, or was assumed to be, an intestacy, and the executors named in the void will in each case paid the rents to the wrong person. And if Mrs. Goff was entitled in the one instance to claim the benefit of the Statute of Limitations, it seems impossible to refuse a like benefit to Columbus Hopkins. And one difficulty that presented itself in *Re Goff* does not exist here, for neither Columbus Hopkins nor Joseph Hopkins, under whom he claimed, was under any disability that would preclude him from appointing an agent.

The case chiefly relied on for the plaintiff, *Lister v. Pickford*, 34 Beav. 576, is clearly distinguishable from this, for in that the whole of the land passed by the devise to the

trustees named in the will, though the trustees mistook the person beneficially entitled. The trustees therefore held upon an express trust, which is saved from the operation of the statute.

But here there was no express trust ; it was at most a constructive trust arising from the receipt by the executor of the rents of lands belonging to others, and in part to infants. In such a case this Court has held that the rights of the true owners are barred : *In Re Taylor*, 28 Gr. 640. The executor here was equally a stranger to those beneficially entitled to the land in question here as was Taylor in that case.

With every desire, from circumstances mentioned at the hearing, but not stated above, to withdraw the case from the operation of *Re Goff*, *supra*, and *Re Taylor*, *supra*. I feel bound to find that the defendant Columbus Hopkins has acquired a title by possession to the land in question. And the bill is therefore dismissed, but without costs, except the infants' which are to be paid by the plaintiff.

THE plaintiff appealed to the Divisional Court, and in her notice of motion set out the following grounds of appeal : that the evidence did not shew an exclusive possession for the period of ten years on the part of Columbus Hopkins or those under whom or through whom he claimed : that the evidence did not show a wrongful receipt of the rents and profits of the land in question during the period of leasing within the meaning of the statute : that the learned Judge was wrong in holding that the receipt by the executor was a receipt by the said Columbus Hopkins or those through whom he claimed, or that the said executor received the rent as the agent, bailiff, or receiver of the said Columbus Hopkins or those through whom he claimed.

The motion was heard before Boyd, C., and Ferguson, J. on February 19th, 1883.

C. Moss, *Q. C.*, and *W. Nesbitt*, for the plaintiffs. It was urged below that the receipt of rents by the executor was receipt by Joseph, and that this was equivalent to Joseph's possession, and so the statute ran from the death of the testator; and the Judge so held. We contend there was a beneficial bequest of the lease apart from the devise of the lands, and this was a bequest of a chattel interest, and as such was not affected by the interest of the witness. Witnesses were not required to wills of personalty till 1874: *Emanuel v. Constable*, 3 Russ. 436; *Foster v. Banbury*, 3 Sim. 40; *Brett v. Brett*, 3 Add. 210, 1 Hagg. 58 N. Williams's Law of Executors, 7th ed., vol. 1 p. 819, as to bequests of rent: *Jarman* on Wills, 4th ed. vol. 1 p. 71. The statute in question is 25 Geo. II. ch. 6. This is a chattel interest which would pass to a man's executors, as being severed from the land itself. This rent issues out of the land in a sense, but only by distress, and not by a sale of the land. The bequest is of a debt only and nothing more, and it is not a legacy charged on land. If it was a question of distress that would have to be by the reversioner, and the claim for the rent is a mere rent charge. The testator separates the rent from the reversion. The executor was rightfully in receipt of the rents, what he did with the rent is another matter. Following in *Re Goff*, 8 P. R. 92, the Judge below held the executor received rents as agent or trustee for Joseph Hopkins, but this is incorrect. In *Re Goff* the rent was not separated from the reversion as here. In this will the executor is named, with full power to carry the provisions of the will into effect. Several members of the family helped to work on the place, and so Columbus Hopkins had no exclusive possession: *Lloyd v. Henderson*, 25 C. P. 253; *Kipp v. The Incorporated Synod of the Diocese of Toronto*, 33 U. C. R. 220. Joseph Hopkins and Columbus Hopkins set up that the executor collected the rents for them, and if so he collected under the will, and they would be estopped from setting up its invalidity. We also refer to *Conyngham v. Conyngham*, 1 Ves. Sen. 522; *Philippo v. Munnings*, 2

M. & Cr. 309; *Lister v. Pickford*, 34 Bea. 576; R. S. O. ch. 108, sec. 5, sub. sec. 5.

S. H. Blake, Q. C., and *Lazier*, for the defendant Columbus Hopkins. There was a wrongful receipt of the rent by the executor, and the statute began to run at once therefrom. We refer to sec. 5 of the Statutes of Fraud, which relates to "devises and bequests of land and tenements;" also to *Doe dem. Taylor v. Mills*, 1 Moo. & R. 288; *McDonald v. McKay*, 15 Gr. 391; *Bennet v. O'Meara*, *Ib.* 396; *Brett v. Brett*, 3 Adams 210; *Boys v. Wood*, 39 U. C. R. 495; *Stevens v. Buck*, 43 U. C. R. 1; *Bigelow* on Estoppel, 2nd ed., p. 467, (as to element of fraud): R. S. O. ch. 108, secs. 11 & 12; *Adamson v. Adamson*, 25 Gr. 550.

C. Moss, Q. C., in reply. The accounts and receipts shew a dealing with the property by the executor as an executor, and it was not supposed that he was there in any other capacity. He was not collecting for Joseph Hopkins except as under the will, and not for him as a wrong doer, so as to give a start to the statute in favour of Joseph. All parties concurred in the mistaken belief that the will was valid. *Yardley v. Holland*, L. R. 20 Eq. 428; *Board v. Board*, L. R. 9 Q. B. 48, S. C. 22 W. R. 206; *Faulds v. Harper*, 2 O. R. 405, were also referred to.

June 11, 1883. *BOYD*, C.—The first question arises upon the will as affected by the statute 25 Geo. II. ch. 6, which was in force here at the date of the testator's death. Sec. 1 declares that "if any person shall attest the execution of any will to whom a beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate (other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts,) shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void." After conflicting decisions it is settled that this provision does not apply to wills of mere personal estate,

which were at that time valid without the attestation of any witnesses, but only to such wills and codicils as were by the Statute of Frauds required to be attested: *Emanuel v. Constable*, 3 Russ. 436; *Brett v. Brett*, 3 Add. 210, S. C. in App. 1 Hagg. 587.

Reverting to the Statute of Frauds, 29 Ch. II. ch. 3, sec. 5, that requires that all devises and bequests of any land or tenements should be in writing and signed and attested as therein set forth. It is argued that the testamentary disposition of the rents pending the Duffield lease was not invalid under the statute of Geo. II., because it was only tantamount to a will of personal estate, *quoad* the rents. It is conceded that the devise of the lands in fee subject to the lease is void by the Statute of Geo. II. And hence the reversion is cast upon the heirs-at-law, who, but for the clause as to the rents, would be entitled to them as an incident of the reversion. Rent is something issuing out of the land as a compensation for the possession during the term, (*Woodfall's Law of Landlord and Tenant*, 12th ed. p. 346,) or as Gilbert puts it: "it is a retribution from the profits of the land which cannot be enjoyed during the term," but by the tenant, (*Gilbert on Rents*, p. 62). When a man seized in fee makes a lease for years, reserving rent, the whole rent which becomes due after his death shall go with the reversion, (as an incident thereof,) to his heirs and not to his executor; for since during the continuance of the particular estate the reversioner loses the profits of the land, the rent ought to be paid him as a compensation for the loss: *Williams's Executors*, 8th ed. vol. 1, p. 824; *Gilbert on Rents*, 66. Accruing rent may be granted or assigned by deed or it may be severed from the reversion by devise, and it then becomes as in this case, rent-seck. Rent of whatever nature (service, charge, or seck,) and whether issuing out of a chattel or a freehold estate, is treated in the books as an incorporeal hereditament. A rent issuing out of land is a tenement, though there be no power of distress: *Dodds v. Thompson*, L. R. 1 C. P. 133. It is a tenement in which the assignee or

devisee of it has an estate although he has no interest in the land out of which it issues. Though it be a rent-seck, yet under 4 Geo. II. ch. 28 the devisee has the right to enter upon the land out of which it issues and distrain for its recovery: *Dove v. Dove*, 18 C. P. 424; *Hope v. White*, 17 C. P. 52, S. C. 18 C. P. 430, and in appeal 19 C. P. 479. In *Earl of Stafford v. Buckley*, 2 Ves. Sr. 177, Lord Hardwicke says: "Rents partake of the nature of land, following that, and consequently are all within the Statute of Frauds, which relates to lands and tenements. So future rent is held to be an interest in land, an agreement touching which could not be proved by parol evidence, in *Ex parte Hall*, *In re Whitting*, L. R. 10 Chy. Div. 615; and it was held that an instrument affecting accruing rent was registrable under the then Registry Acts in *Gilmour v. Roe*, 21 Gr. 284. In *Buckeridge v. Ingram*, 2 Ves. Jr. 664, the distinction is marked, between personal annuities having no relation to lands or tenements, and those charges which did partake of the nature of rents and were a real hereditament. In *Habergham v. Vincent*, 2 Ves. Jr. 204: Buller, J., said: It is clear upon the Statute of Frauds that a rent could not pass out of freehold estate, unless there were three witnesses; "as the statute says 'lands and tenements,' and a rent is a tenement, and if a tenement could pass without witnesses it would be in direct opposition to the Act."

In *Ards v. Watkins*, 2 Cro. Eliz., a lessee for years sublet part of the term, and devised part of this rent to his sons. The Judges agreed that debt lay for the rent devised at the suit of the sons. It was held that rent may be devised and divided from the reversion, for it is not merely a thing in action, but *quasi* an inheritance. And Popham, J., agreed that, although a thing in action cannot be transferred over nor be devised; yet a contract which ariseth from an interest in land or which is an interest may be well transferred over. Upon the adjourned case, at p. 651, the Judges held, that although a contract or a thing in action cannot be transferred or divided, yet rent only may be. For it is a thing in possession, for he doth not grant

the action, but the law gives it as incident to the rent. On this occasion Popham doubted, for the reason that when part of a reversion and part of a rent is granted that is good; but when the rent is severed from the reversion, it is otherwise, for then it is but in the nature of an annuity which cannot be granted by parcels, but entirely; but an annuity or rent only are grantable over because they are things of continuance, and are not personal.

As put by Lord Cranworth, in *Blann v. Bell*, 2 DeG. M. & G. 781, by the feudal law a devise of the rents and profits of real estate carries with it the property in the land. In substance the devise in this case attempted to carve out a chattel interest in the lands for the term of years fixed by the lease, and vest it in the son Joseph and an executor in trust for Joseph as joint-tenants, and it is equivalent to a devise of the lands to that extent within the meaning of the Statute of Frauds: *Doe dem. Goldin v. Lukeman*, 2 B. & Ad. 30. But for this separation of the rent from the inheritance, the whole would pass to the heirs-at-law as reversioners, and I adopt as an accurate statement of the old law the language of the Master of the Rolls. in *Whitchurch v. Whitchurch*, 2. P. Wms. 238, that a will not attested as the Statute of Frauds requires, should not pass any estate of which the heir, as heir, would otherwise have had the benefit. See, also, *Villiers v. Villiers*, 2 Atk. 72.

For these reasons I agree in the conclusion of the judgment appealed from, that this will is inoperative as to the rents, so that the case is to be dealt with as if there had been a complete intestacy as to this parcel of land.

At the testator's death the persons rightfully entitled to collect the rents were the heirs-at-law. The perception of these rents by the executor was from the outset "wrongful" within the meaning of the statute, *R. S. O. c. 108*, s. 5, ss. 5: *Williams v. Pott*, L. R. 12 Eq. 149. The collection of the rents by the executor and the payment of them to Joseph, was in effect a possession of the land by Joseph, in favour of whom the statute would run.

The evidence shows no interruption of this possession

by Joseph, and those who claim under him. The entry on the land for the purpose of working it, by some of the other heirs, was at the instance of Joseph's grantee, Columbus, and in subordination to his assertion of sole ownership. They were in truth his agents, and their possession was his: *Williams v. Potts*, *supra*, and *Doe dem Baker v. Coombes*, 9 C.B. 714. The evidence on this head does not lead me to disagree with the conclusions of the Judge who heard and saw the witnesses. The heirs-at-law, other than Joseph, might have disputed his right to the rents and to the possession; not doing so till after the lapse of the statutory period, they are clearly barred. The operation of the statute is thus to preserve to the beneficiary intended by the testator the benefits conferred upon him by the void will: *Yardley v. Holland*, L. R. 20 Eq. 428; *Re Goff*, 8 P. R. 93 affirmed on appeal. As against the heirs-at-law, no estoppel arises to prevent those acting under the will from claiming the benefit of the statute: *Board v. Board*, L. R. 9 Q. B. 48; *Paine v. Jones*, 22 W. R. 837. *Lister v. Pickford*, 34 Beav. 576, has no application the moment it is ascertained that the executor was a wrong-doer *ab initio* in intermeddling with the rents. The result is that the judgment must be affirmed, with costs.

FERGUSON, J., concurred.

Judgment affirmed, with costs.

[CHANCERY DIVISION.]

KLEIN ET AL. V. THE UNION FIRE INSURANCE
COMPANY ET AL.

Fire Insurance—Mortgage—Subrogation—Statutory conditions 1 and 8—Company—Misrepresentation—Power of manager to compromise claim—Notice to subordinate clerk—Policy effected by agent—Non-disclosure of prior mortgages and incumbrances—Counter-claim in mortgage action—Practice—R. S. O. ch. 162.

On Feb. 21st 1879, A. B. & Co., the plaintiffs, gave a mortgage on a mill property covenanting to insure, which they did in the R. company, by policy dated March 19, 1879, expiring March 1, 1880. On March 10th, 1879, A. left the firm. On March 1st, 1880, the mortgagees, having received no renewal receipt of the above policy, insured the property in the U. company in the name of the plaintiffs. This U. policy provided that the loss should be payable to the mortgagees, and the insurance as to the interest of the latter should not be invalidated by any act of the mortgagors, and that if the mortgagors did any act invalidating the policy, and the insurers should pay the amount of the policy to the mortgagees, they should be subrogated to the rights of the latter, or might pay the whole of the mortgage debt, and obtain an assignment of the mortgage. There was no written application for the U. policy. The R. policy was simply handed to the insurers, and from it they drew their policy, which had the statutory conditions only. No representations were made to them in any other way. The premium was paid by the mortgagees, who collected it from the plaintiffs, the latter having taken no part in effecting it. On March 14th, 1881, the mortgagees wrote a letter to the plaintiffs in which they represented the U. policy as indisputable. A fire having occurred the U. company paid the mortgagees the amount of the loss, which more than covered the amount due on mortgage, of which they took an assignment. The evidence showed that at the time of effecting this policy there were certain insurances on the property, and also certain mortgages, of which the U. company were not informed and to which they never assented. The plaintiffs now, suing on the U. policy claimed to have the mortgage discharged and the balance of the insurance money paid to them, and the U. company counterclaimed for the amount due on the mortgage :

Held, (reversing the decision of Ferguson, J.) that the non-communication of A.'s retirement from the firm was not a breach of statutory condition No. 1, because A, though he had retired, retained an insurable interest, both as liable on the covenants in the mortgage, and as still retaining the right to redeem the mortgage; and, moreover, even if A. had no interest at all, the surviving partners could recover according to the extent of their interest.

Semble, even if notice of the change had been of moment, yet, since the evidence showed that the matter of the policy, as between the mortgagees and the U. company, was left to the under-clerks to deal with, and that a clerk of the mortgagees informed a clerk of the U. company of the change in question, a jury might properly find that notice of the change was communicated to the U. company.

Held, further that the non-communication of other mortgages, subsequent to that to the plaintiffs, was not a breach of statutory condition No. 1, because such non-communication will not, apart from stipulation,

irrespective of the nature and amount of the other mortgages, and without any imputation of fraud, avoid a policy; and also because the plaintiffs were not bound unasked to state the exact nature and extent of the interest to be insured, and there was at least contributory negligence on the part of the insurers, who might be regarded as having waived information as to the mortgages.

Sarno v. Gore District Mutual Insurance Co., 1 App. 545, followed.

Held, further that the fact of there being two prior insurances unassented to was not a breach of statutory condition No. 8, because the evidence showed the U. policy was to take the place of the R. policy, and of the prior insurances one was assented to on the face of the R. policy and the other had been taken in substitution for another, which also appeared as assented to on the R. policy. It was the duty of the U. company to have properly issued their policy, agreeing to take the position of the R. company, as also it was the duty of the mortgagees to see the policy properly issued.

Held, further, that the letter of March 14th, 1881, contained representations which the mortgagees were bound to make good, especially as the U. company acted as agents for the plaintiffs in effecting the policy.

Held, further, that the claim of the U. company to foreclose could not be entertained, for the U. company could not take advantage of their own default in not making the formal entry of assent to the prior insurances on their policy to bring into play the subrogation clause for their own advantage.

Springfield Fire Insurance Co. v. Allen, 43 N. Y. 387 distinguished.

Held, lastly, on the whole case, it should be declared that the mortgage had been paid, and the proper discharge should be executed, and the mortgagees should pay the balance of the insurance money to the plaintiffs, with interest, with costs of suit to the plaintiffs as against both defendants, but without prejudice to the defendants litigating their respective liabilities as between themselves.

Quaere, also, whether upon the facts stated below the plaintiffs were not entitled to recover on the ground of a compromise made between the parties.

Held, per FERGUSON, J., O. J. A. Rule 17, and G. O. Chy. 647 do not apply to counter-claims.

THE statement of claim in this case was filed by John Klein, Thomas Poehlman, and Henry G. Kalbfleisch, plaintiffs, against the Union Fire Insurance Company, the Union Loan and Savings Company, and William Badenach, defendants, claiming an account of what was due under a certain mortgage, and to have the said mortgage discharged, and other relief, under the circumstances fully set out in the judgment of Mr. Justice Ferguson.

It may, however, be observed that the paper "attached by way of endorsement," as mentioned in the said judgment, to the policy effected by the defendants, the Loan Company, on March 1, 1880, with the defendants, the Union Fire Insurance Company, was a separate slip of paper, gummed at one end to the face of the policy.

The cause was heard and witnesses examined on December 16, 17, and 19, 1881, at Toronto, before Ferguson, J.

S. H. Blake, Q. C., and *Wood*, for the plaintiffs. The Union Loan Company having forced the plaintiffs into a false position, it is their duty to see that the plaintiffs are not in any worse position than they were in with the Royal Insurance Company. The Loan Company should make good the representations contained in the letter of March 16, 1881: *Patterson v. Royal Ins. Co.*, 14 Gr. 169. To the extent that the act of the Loan Company has prevented the mortgage being discharged by the Royal Insurance Company, they are liable to the plaintiffs. If the mortgage had remained in the hands of the Loan Company they could not have recovered upon it the \$3,000, because they destroyed the means of paying, viz., the insurance in the Royal,

J. Bethune, Q. C., and *F. E. Hodgins*, for the defendants, the Union Fire Insurance Company. Even assuming that the plaintiffs are to be considered the assured in this case, yet the statutory conditions are not complied with. The 8th statutory condition (R. S. O. ch. 162) is not complied with, no matter what may be said the Loan Company only made this contract, and in the face of it we are under the circumstances protected, we were bound to pay the Loan Company. The terms of the particular contract of subrogation, &c., over-ride the general contract or agreement: *Mechanics Building and Savings Society v. Gore District Mutual Fire Ins. Co.*, 3 App. 151. As to the letter of March 14, 1881, it cannot affect us. It is not evidence against us. It cannot bind because there was no agency: *Peck v. Powell*, 26 Gr. 322; *French v. Skead*, 24 Gr. 149; *Kitt-ridge v. Dominion Savings and Investment Co.*, 23 Gr. 631. The Loan and Savings Company may be decreed to put the plaintiffs in as good a position as if what is stated in the letter of March 14th, 1881, were true. Then no contract was made with the plaintiffs' firm. The firm of KleinKalbfleisch & Co. had ceased to exist, and we did not know of it. This change was not communicated to us; and the first

statutory condition, (R. S. O. ch. 162) was broken. As to what the manager of the Insurance Company said as to paying \$3250, this evidence does not affect us. There can be no waiver but as provided by the policy. Besides the agreement of the manager was *nudum pactum*; there was no consideration: *Panzerbeiter v. Waydell*, 21 Hun. 161. There has been no waiver of breaches of the conditions: *Credit Co. v. The Canada Agricultural Ins. Co.*, 17 Gr. 418; *Stickney v. Niagara District Mutual Ins. Co.*, 23 C. P. 372; *Mason v. Hartford Fire Ins. Co.*, 37 U. C. R. 437; *Merritt v. Niagara District Mutual Fire Ins. Co.*, 18 U. C. R. 529; *Davis v. The Canada Farmers Mutual Ins. Co.*, 39 U. C. R. 452; *McCrea v. The Waterloo County Mutual Fire Ins. Co.* 26 C. P. 431, S. C. in Appeal, 1 App. 218; *Lyndsay v. The Niagara District Mutual Fire Ins. Co.*, 28 U. C. R. 326.

They also referred to *Greet v. Citizens Ins. Co.*, 5 App. 596; *Bloxsome v. Williams*, 5 D. & R. 82; *Clark v. Eby*, 11 Gr. 98; *Houliston v. Parsons*, 9 U. C. R. 681; *Carpenter v. Providence, Washington Ins. Co.*, 16 Peters 495, S. C. in App. 4 How. 185; *Parsons v. Victoria Mutual Fire Ins. Co.*, 29 C. P. 23; *Parsons v. The Standard Fire Ins. Co.*, 5 S. C. 233; *Mason v. Andes Ins. Co.* 23 C. P. 37; *Bruce v. The Gore District Mutual Assurance Co.*, 20 C. P. 207; *Weinaugh v. The Provincial Ins. Co.*, 20 C. P. 405; *Dickson v. Provincial Ins. Co.*, 24 C. P. 157; *Hendrickson v. The Queen Ins. Co.*, 30 U. C. R. 108, S. C. in App. 31 U. C. R. 547; 39 Vict. ch. 93, Ont.

J. E. Rose, Q. C., and *J. H. Macdonald*, for the Union Loan Company. As to the offer made by the manager of the insurance company, the manager was acting for the board, and it should be assumed with their concurrence. There were material considerations for the offer to pay \$3,250. It should be assumed the board had passed a resolution authorizing the offer. Much less is sufficient: *Bryce on Ultra Vires*, 2nd ed., pp. 459, 464, 494, 523, 562. The Union Loan Company had no notice of the retirement of Klein from the firm. They have done nothing wrong; and

cannot be liable as guarantors. The letter of March 14th, 1881, was written in good faith, and by a subordinate officer in the company, and the company cannot be liable for misrepresentations made to him. They also referred to *Western Assurance Co. v. The Provincial Insurance Co.*, 26 Gr. 561, S. C. in App. 5 App. 109; *May on Insurance*, 1st ed., 201; *Wilkinson v. Coverdale*, 1 Esp. 74, cited in notes to *Coggs v. Bernard*, 1 Sm. L. C., 8th ed., 218; *Smith v. Hodson*, 2 Sm. L. C. 126; *Brewer v. Gregory*, 7 B. & C. 310; *Lythgoe v. Vernon*, 5 H. & N. 180; *Buckland v. Johnson*, 15 C. E. 145; *Valpy v. Sanders*, 5 C. B. 886; *Addison on Torts*, 5th ed., p. 46.

S. H. Blake, Q. C., in reply. The policy is indisputable as to both claimants. No representations of any kind were made by the plaintiffs. The only information given was the handing over of the policy in the Royal that a new one might be drawn. In any case the plaintiffs represented nothing, Klein had an insurable interest as mortgagee, though he had retired from the firm. The Loan Company having asserted in the letter of March 14th, 1881, that the policy was indisputable, they cannot retreat from that statement. They here paid agents of the insurance company, receiving a commission of $12\frac{1}{2}$ per cent. There is no right of subrogation. *Primâ facie*, there is no such right. The insurance company should have notified the plaintiffs. Moreover, as there was no forfeiture by the plaintiffs, there could not be subrogation.

September 15, 1882. FERGUSON, J.—The plaintiffs carrying on business at the village of Tavistock as millers, under the name and firm of Klein, Kalbfleisch & Co., borrowed from the defendants, the Union Loan and Savings Company, the sum of \$4,000, and to secure the same executed a mortgage upon their mill property, bearing date the 21st February, 1879.

The mortgage contained the usual covenant of the mortgagors to insure the property (the buildings, &c.,) to an amount not less than \$4,000, and in pursuance of this

covenant they obtained a policy from the Royal Insurance Company, for this sum, bearing date the 19th March, 1879, and being an insurance from the 1st March, 1879, to the 1st of March, 1880, at noon. In this policy the loss, if any, was made payable to the defendants, the Union Loan and Savings Company; and it is said that the policy was assigned to them.

In October, 1879, an agreement was entered into between the defendants, the Union Loan and Savings Company and the defendants the Union Fire Insurance Company, whereby the Loan Company covenanted to effect with the Insurance Company *all insurances under their reasonable control* during the currency of a certain lease for the period of five years, existing between the two companies; and the Insurance Company covenanted with the Loan Company to allow and pay them a commission of $12\frac{1}{2}$ per centum on all premiums paid through the agency of the Loan Company; and that the insurances effected by or through the Loan Company in respect to property mortgaged to them should be unconditional, and that the right to recover the insurance money should not in any way be dependent on or affected by any act of the mortgagors. There were other provisions in this agreement which do not appear to be material here.

Prior to the 1st of March, 1880, the Royal Insurance Company sent a renewal receipt for the renewal for one year more of the plaintiffs' policy to Mr. Gordon, their agent at Stratford. Gordon had been in communication with the plaintiffs on the subject of this renewal, and arrangements had been made between them for the payment of the necessary premium, which, however, was not actually paid; but, nevertheless, Gordon countersigned the renewal receipt and forwarded it by mail from Stratford to the defendants, the Loan Company, in Toronto, as he says, in time to reach them, in the usual course, about two hours after the expiry of the policy, which was then in the hands of the Loan Company.

Gordon, in his evidence, says, that he had from the

Royal Insurance Company authority to renew policies on credit; that is, without actual payment of the premium; and there can, I think, be no doubt that the intention of the plaintiffs and of Gordon was perfectly sincere and correct in regard to this intended renewal. By this time the sum of one thousand dollars had been paid upon the mortgage, leaving the balance \$3,000.

The Loan Company on the 1st of March, 1880, (it is said early in the day), and before receiving Mr. Gordon's letter, enclosing the renewal receipt, effected an insurance with the defendants, the Insurance Company, in the name of the plaintiffs, upon the plaintiffs' property for the sum of \$4,000, such insurance to be from the 1st of March, 1880, at noon, to the 1st of March, 1881, at noon, the amount of the premium being \$120, and to this policy is attached by way of endorsement, a paper in these words:

"Loss, if any, payable to the Union Loan and Savings Company, Toronto, as hereinafter provided. It is hereby agreed that this insurance, as to the interest of the mortgagee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, nor by the occupation of the premises for purposes more hazardous than are permitted by the terms of the policy. It is also provided and agreed that the mortgagee shall notify the company of any change of ownership or increase of hazard not permitted by the policy to the mortgagor or owner as soon as the same shall come to his knowledge, and shall on reasonable demand pay the additional charge for the same, according to the established scale of rates, for the time such increased hazard may or shall have been assumed by this company, during the continuance of this insurance. It is also agreed that whenever this company shall pay to the mortgagee any sum for the loss under this policy, and shall claim that as to the mortgagor or owner no liability therefor existed, it shall at once, and to the extent of such payment, be legally subrogated to all the rights of the party to whom such payment shall be made under any and all securities held by such party for the payment of said debt; but such subrogation shall be in subordination to the claim of the said party for the balance of the debt so secured, or said company may at its option pay to the said mortgagee the whole of the debt so secured, with all the interest which may have accrued thereon, to the date of such payment, and shall thereupon receive from the party to whom such payment shall be made an assignment and transfer of said debt, and all securities held by such party for the payment thereof. This endorsement is a part of policy No. 4893, issued by the Union Fire Insurance Company."

The endorsement is signed by the manager of the company. The No. 4893, is the number of the policy, and the policy bears date the 10th of March, 1880. The receipt, sent by Gordon to the defendants, the Insurance Company, was returned by them to him in a letter, bearing date the 3rd of March, 1880, advising him that they had insured the property in another company. Gordon says that when this receipt came back to him, he erased his signature upon it; and that he sent it back to the head office of his company about a week or ten days afterwards. Gordon was the sole agent of the Royal Insurance Company at Stratford. This receipt is produced, and has written across it in a bold hand in pencil, "Cancelled," "not renewed."

There appears to have been no written application to the defendants, the Insurance Company, for the policy. The policy of the Royal Insurance Company was simply handed to them, and from this they drew their policy. Nor were any representations made to them at the time of effecting the insurance. The plaintiffs took no part whatever in effecting this insurance.

On the 10th of March, 1879, the plaintiff Klein retired from the plaintiffs' firm and conveyed all his interest in the property insured to his co-plaintiffs, (who thereafter carried on the business under the name and firm of "Poelman, Kalbfleisch & Co.,") subject to the mortgage to the defendants, the Loan Company.

After the happening of the fire, (which occurred on the 22nd of April, 1881,) the defendants, the Loan Company, assigned the mortgage from the plaintiffs to the defendants, the Insurance Company, on receiving from them payment of the amount unpaid upon the mortgage. This was done in pursuance of the arrangement between the two companies already mentioned.

Proofs of the loss sustained were furnished, and although objections to these were made, there is now no question as to the propriety of them.

On the face of the policy of the Royal Insurance Company, which was handed the defendants the Insurance

Company, before the issue of the policy in question, there was a statement of an insurance in the Wellington Mutual Company for \$2,000, and of another in the Merchants and Manufacturers for \$2,000 more.

In the proofs of loss, there is—in answer to the sixteenth question, which is, was there any other insurance whatever on said insured property since the date of said policy?—a statement that the only other insurances on said property, were as follows: \$2,000 in the Phoenix, on mill and storehouse; \$2,000 in the Wellington Mutual, on mill and machinery; the words, “since the date of said policy,” being struck out of the printed form of answers.

The premium was accounted for by the defendants, the Loan Company, to the defendants, the Insurance Company, and the Loan Company collected and received the same from the plaintiffs, including the $12\frac{1}{2}$ per cent.

Upon this policy the action is brought. The plaintiffs claiming to have the mortgage discharged, and that the balance of the moneys after paying the amount due upon it should be paid to the plaintiffs, Poelman and Kalbfleish, as trustees for the plaintiff Klein, and one John Schaefer and Henry Schaefer, who have a mortgage on the property, subsequent to the mortgage to the defendants, the Loan Company (*a.*)

The policy is one having the statutory conditions, with variations. The defendants, the Insurance Company, by the fourth clause in their statement of defence, say, that

(*a.*) The plaintiffs' claim was (1) to have an account taken of the amount due on the mortgage to the Union Loan and Saving Company; (2) to have the said mortgage discharged; (3) that in the meantime all proceedings to enforce the said mortgage be stayed; (4) to have the remainder of the said insurance moneys paid to the plaintiffs Thomas Poelman, and Henry G. Kalbfleish as trustees for the plaintiff John Klein and for John Schaefer, and Henry Schaefer mentioned in the judgment; (5) that if it should appear that by reason of the matters alleged in the defence of the Union Fire Insurance Company they are not liable to the plaintiffs, that the defendants, the Union Loan and Savings Company be ordered to make good the loss sustained by the plaintiffs; (5) for these purposes to have all proper directions given and accounts taken, and for general relief.

the policy was subject to the first statutory condition, (setting out the condition), and stating as a breach the retirement of Klein from the plaintiffs' firm, and that he had no insurable interest in the property insured; that the plaintiffs omitted to communicate this fact to them; that it was a circumstance material to be known to them to enable them to judge of the risk, &c.

By the 5th paragraph in the same statement, these defendants set up the mortgage to the plaintiffs Klein and the Schaefers for \$6,500, or thereabouts, which they say was given about the 10th March, 1879, as a breach of the same condition; and similarly another mortgage upon the property made by Poehlman and Kalbfleisch, to one Charles Poehlman, for \$2,500, about the same date (*b*), and by the seventh and eighth clauses of the statement of defence, these defendants say that the policy was subject to the 8th statutory condition, which was endorsed upon it, setting it out in these words: "The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is endorsed hereon; nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto by writing, signed by a duly authorized agent;" and they allege as breaches of this condition, that at the time of the issuing of the policy there were prior insurance in other companies: namely, the one in the Phoenix for \$2,000; the one in the Wellington for \$4,000; one in the Royal Insurance Company for \$4,000; and an insurance in the Citizens Insurance Company; and that the assent of these defendants did not appear in the policy, nor was it endorsed thereon.

The defendants the Insurance Company seeks to enforce the payment by the plaintiffs of the amount unpaid upon the mortgage assigned as aforesaid to them; and in the event of its being considered that the plaintiffs are entitled to any relief against the defendants or any of

(*b*) These were mortgages on the property subsequent to the plaintiffs' mortgage to the Union Loan and Savings Company.

them, that their co-defendants, the Loan Company, may be ordered to make good to them all losses or damage which they may be put to, in accordance with certain covenants contained in the assignment of the mortgage to them (c).

The defendants, the Loan Company, in their statement of defence, amongst other things, say that they effected the insurance in question for their own protection, the plaintiffs having neglected to renew the insurance in the Royal Insurance Company, and that notice of their having done so was given to the plaintiffs immediately; that they had at the time no notice of the plaintiff Klein having retired from the plaintiffs' firm, nor of the several facts set forth in the statement of defence of their co-defendants, the Insurance Company, and for their non-disclosure of which, on the application for the insurance, the policy is sought to be avoided.

The plaintiffs by way of reply, amongst other things, say that the defendants the Insurance Company had, at the time of the granting of the policy, notice that other insurances existed on the property to the amount of \$4000, and that they never had notice or knowledge that the policy sued on contained any of the conditions set forth in the statement of defence; and to the counter claim they set up the several matters set up in their statement of claim.

Apart from some contention as to an alleged compromise, the claim of the plaintiffs against the defendants the Insur-

(c) The defendants the Insurance Company, and William Badenach, who put in a joint statement of defence, claimed by a joint counter claim, (1) that the plaintiffs might be ordered to pay to the defendant William Badenach as trustee for them the amount unpaid on the mortgage; (2) that in default of payment the premises might be sold to pay the debt; (3) and the plaintiffs ordered to pay any deficiency; (4) for a writ of *hab. fac. poss.* against the plaintiffs, and that they might be put in possession of the said premises; (5) that in the event of its being considered that the plaintiffs are entitled to any relief against the defendants or either of them by reason of the said assignment or other matter alleged in connection therewith, that the Union Loan and Savings Company may be ordered to make good to them, the Insurance Company, all loss or damage which they might thus be put to in accordance with the covenants in the said assignment; (6) for all proper directions, &c.; (7) and general relief.

ance Company, is upon the policy. This policy is subject to the conditions that have been set up by the company. No doubt these are good and valid conditions. That there was a breach of each of these conditions cannot, I think, admit of a doubt. There can, I think, be no question that it was material for the Insurance Company to know at the time of the granting of the policy the true ownership of the property, and the extent of the encumbrances upon it, to enable them to judge of the risk, within the meaning of the terms of the first statutory condition; and it is plain that these facts were not declared to them. They were also entitled, under the 8th statutory condition, to be told what prior insurances were upon the property, and this condition provided that they were not to be liable unless their assent to any such prior insurance appeared in or was endorsed upon the policy. The same condition provided that if any subsequent insurance were in any other company, they were not to be liable on the policy unless and until they assented thereto by writing signed by a duly authorized agent. It is admitted that there was an insurance in the Phoenix Insurance Company. This is not mentioned in, nor is it endorsed upon the policy sued on. There is no assent by these defendants to that insurance. There is no evidence whatever that the defendants the Insurance Company had any knowledge of it, or ever got any notice of it till after the happening of the fire. This insurance in the Phoenix Company must, I think, in any view of the subject, be a breach of this eighth condition. It is not necessary, I think, to allude to the other insurances complained of, as there is clearly a breach of the condition.

The plaintiffs say that they did not make the application for this insurance, that they had no connection whatever with the application. This is apparently quite true, but, so far as the defendants the Insurance Company are concerned, the plaintiffs by suing on the policy adopt the Act of the Loan Company in obtaining it, and they must recover upon the policy as it is, or they cannot

recover upon it all. It is said, and truly, that there was not, as is usual, a written application for the policy, but I do not see how this circumstance can affect or change the meaning of the policy or conditions. I am of the opinion that the plaintiffs cannot recover upon this policy.

It was urged that a compromise had been effected between the plaintiffs and the manager of the defendants the Insurance Company, at the sum of \$3,250, but I think the evidence failed to shew that this was binding upon the company. The manager did make the offer. The solicitor for the plaintiffs asked till the following Tuesday to accept or reject it. There was, I think, an acceptance within the time, but I fail to see how this was binding upon the corporation. Counsel for the Union Loan Company argued that it should be assumed that the offer was made pursuant to authority received from the board of directors. I do not think I am to assume anything, and the plaintiffs, seeking to recover upon a contract of this sort, must prove it, or they cannot succeed. If there really was authority from the board of directors to the manager to make the offer, or to effect a compromise in this way, it was not a difficult thing to prove, and there is no evidence whatever of it.

Then, as against the defendants the Loan Company, the plaintiffs urge that the Loan Company were aware at the time of effecting the insurance of the withdrawal of Klein from the plaintiffs' firm, that they ought not to have effected such an insurance as they did, and that as they (the Loan Company) afterwards represented to the plaintiffs that the insurance was *indisputable on any grounds*, and that there would, in case of a loss, be no trouble or delay in obtaining a settlement, the Loan Company should be made to suffer the loss, in case the Insurance Company are not liable to the plaintiffs for it.

In support of the statement that the Loan Company were aware of the fact of Klein's withdrawal from the firm a receipt for an instalment of \$260, paid on the mortgage, signed by the secretary of the company,

dated the 23rd February, 1880, in which it is stated that the money was received from Poehlman & Kalbfleisch, on account of mortgage (Klein, Kalbfleisch & Co.); a receipt for a similar sum, dated the 25th May, 1880, in which it is again stated that the money was received from Poehlman & Kalbfleisch, and the receipt of the 4th December, 1880, mentioning Poehlman & Kalbfleisch & Co. again, and three letters, one of the 5th March, 1880; one of the 17th April, 1880; and one of the 30th April, 1880, each addressed to the secretary, and signed "Poehlman & Kalbfleisch;" are relied upon. There is no direct and positive evidence of the fact of the change having been communicated to the Loan Company, and I do not think these documents sufficient to prove knowledge of it. They have reference to payment on the mortgage or to cheques, or payments of some kind, and it was not important to the Loan Company from whom they received the money. They received it and credited it on account of the mortgage as directed, and there was the end for the time being. It might well be that one firm was paying money for another, there are several mistakes in the name of Poehlman, which is written "Portman." Each of two of the letters refers to a letter received from the secretary to which it was a reply or answer, and if the plaintiffs had produced these, they might have thrown some light on the question one way or the other. I think I cannot find upon this evidence, in the face of the denial of these defendants that they had been notified or had knowledge of the change in the plaintiffs' firm. The representation as to the insurance being *indisputable*, was by letter of the 14th March, 1881 (*d*). It is apparently in reply to a letter from the plaintiffs, and states that in case a fire occurred the Loan Company would only claim the balance due on the mortgage, that the balance would go to the plaintiffs, and then says: "These policies we apply for are indisputable on any grounds, so that there would be no

(*d*) This letter was written by McLean, the manager of the Union Loan and Savings Company.

trouble or delay in obtaining a settlement. Please send check at par," &c. This was long after the insurance had been effected, apparently after the expiration of the year, and the check spoken of was doubtless in respect of the renewal premium. There is no evidence that the plaintiffs did or abstained from doing any act in consequence of having received the letter containing this representation. Klein retired from the plaintiffs' firm on the 10th March, 1879. The renewal receipt from the Royal Insurance Company, dated 1st March, 1880, is in favour of Klein, Kalbfleisch & Co., indicating that the agent of the Royal Company had not been notified of this important change, and it is very possible that if the insurance had been continued as intended in that company, the plaintiffs would have been as little able to recover their loss on that policy as I think they are now upon this one. Under such circumstances I do not think that the contention that the Loan Company should pay the loss, or, as it was put,—“make good the representation,” can be sustained.

Then as to the counter claim, whereby the defendant the Insurance Company being the assignees, through a trustee, of the mortgage seek to enforce it against the plaintiffs.

When the agreement attached to the policy as an endorsement upon it, is read in conjunction with and as part of the policy, and the general agreement between the two defendant companies is looked at as well, I think the case falls clearly within the meaning of the case. *The Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389, referred to in *Wood on Fire Insurance* (1878) page 785, in which the policy provided that the loss if any should be payable to the mortgagee, and contained a condition, that in case of any change in the title to the property insured, the policy should be void, the interest of the mortgagee, however, being excepted from the provisions of the condition; and also a condition, that in case of payment to the mortgagee of a loss for which the insurer would not have been liable to the mortgagor, the insurer should be subrogated to the rights of the mortgagee and to an assign-

ment of the mortgage. The condition was broken. The mortgage was assigned to the insurer upon payment of the entire amount thereof, and it was held to be a valid security in the hands of the insurer. In the judgment of the Court it is said, p. 392: "The parties to the policies of insurance have, by the terms of their contract, avoided some of the questions which have embarrassed the Courts, and led in some instances to an apparent conflict of opinion, if not of decision. The rights of the mortgagees are protected against the effect of certain acts of the mortgagor in derogation of the policies, by an agreement that the policies, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor with the qualification, however, that if the mortgagee fail to notify the insurers of any change of ownership after the same shall have come to his knowledge, the policy shall be void. They have definitely determined the question, perhaps not definitely settled by adjudication, as to the right of subrogation."

Further on it is said: "The mortgagee was equitable assignee of the policies containing a provision which, upon the happening of certain events, should absolutely vacate and avoid the insurance as of the property generally, and as a contract of indemnity to the mortgagor, and resolve itself into an insurance of the interest of the mortgagee as such, and make it a personal contract with him in which the mortgagor would have no interest."

Great as the hardship upon the present plaintiffs seems to be, I cannot but be of the opinion that the principles of the case above referred to apply, and that the mortgage is a subsisting security in the hands of the defendants the Insurance Company.

For the reasons that I have endeavoured to state, I am of the opinion that the plaintiffs cannot (even if there were no technical difficulty on account of Klein being joined) recover against the defendants the Insurance Company, or against the defendants the Loan Company, and that the defendants the Insurance Company are entitled to the judgment usual in mortgage cases upon the counter-claim.

I think there should be no costs, except the usual costs of an undefended mortgage case to the defendants the Insurance Company (e).

On December 7, 1882, the plaintiffs moved by way of appeal from the above judgment before the Divisional Court of this division.

S. H. Blake, Q. C., for the plaintiffs. The first question is, can the policy, if indisputable in the hands of the Loan Company, be disputable in the hands of the Insurance Company? At any rate, there is no right of subrogation in the absence of misfeasance or nonfeasance on the plaintiffs' part: *Springfield Fire & Marine Ins. Co. v. Allen*, 43 N. Y. 389; *Westmacott v. Hanley*, 22 Gr. 382; *Wood on Fire Insurance*, sec. 471. The point of distinction, too, in this case is that the plaintiffs were not parties to the contract as to subrogation. The next question is, what is the position of an insurance company who insure without any representations being made to them? Under such circumstances the company must be held to have waived information, notwithstanding any clause in the policy to the contrary. At all events, there was no misrepresentation. If the policy in the *Royal* was a representation, it was so as to facts at its date, and as to them it was true. See *Carter v. Boehm*, 3 Burr.

(e) On settling the judgment herein, the Union Fire Insurance Company sought to have embodied therein an order for immediate payment under the covenant in the mortgage in question, and also an order for immediate possession. The plaintiffs objected, on the ground that these remedies were not asked for in the counter-claim, as they should have been under O. J. A. Rule 17, and G. O. Chy. 647.

The Registrar refused to insert the special remedies asked for.

On November 7, 1882, a motion was made to vary the minutes.

A. Galt, for the motion.

H. Cassels, contra.

FERGUSON, J.—I am of opinion that the order for immediate payment and immediate possession may be inserted in the judgment, although not asked for in the counter-claim. The case of a counter-claim is different from that of an original writ; but I will make a substantive order staying execution until the next Divisional Court.

1905; *Hall v. Peoples' Mutual Fire Ins. Co.*, 6 Gray 185; *Dayton Ins. Co. v. Kelly*, 34 Ohio 345; *Wood on Fire Insurance*, 310, sec. 162; *Liddle v. Market Fire Ins. Co.*, 29 N. Y. 184; *Blake v. Exchange Mutual Ins. Co. of Philadelphia*, 12 Gray 265; *Commonwealth v. Hide*, 112 Mass. 136; *Dodge County Mutual Ins. Co. v. Rogers*, 12 Wis. 374; *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. 416; *Norwich Fire Ins. Co. v. Boomer*, 52 Ill. 442; *Gill v. Canada Fire Marine Ins. Co.*, 1 O. R. 341. Besides, the Loan Company held the policy, and the plaintiffs never knew of its conditions. Then there is no doubt the plaintiffs had an insurable interest: *Springfield Fire and Marine Ins. Co. v. Allen*, 43 N. Y. 389; *Bigler v. New York Central Ins. Co.*, 22 N. Y. 405; *The Bahia and San Francisco R. Co. v. Trittin*, L. R. 3 Q. B. 594; *Foster v. The Mentor Life Ass. Co.*, 3 E. & B. 48; *Tyler v. The Ætna Fire Ins. Co.*, 12 Wend. 507; *Gordon v. The Massachusetts Fire and Marine Ins. Co.*, 2 Pick. 249; *May on Insurance*, 2d ed., p. 200, sec. 171. The difference, too, between marine insurance and fire insurance policies must not be overlooked: *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio 452; *Holmes v. Charleston Mutual Fire Ins. Co.*, 10 Met. 211; *Angell on Fire and Life Insurance*, 2d ed., p. 200. sec. 151. If we are not entitled against the Insurance Company, we are against the Loan Company, since through their act a valid insurance in the Royal Insurance Company was abandoned: *Story on Agency*, 9th ed., secs. 191, 217c.; *Evans on Prin. and Agent*, p. 238; *Mayhew v. Forrester*, 5 Taunt. 615; *Marshall on Insurance*, 305; *Wilkinson v. Coverdale*, 1 Esp. 74; *Johnston v. Graham*, 14 C. P. 1. The Loan Company having taken upon themselves the position of agents for the purpose of effecting insurance, are responsible for negligent or wrongful concealment: *Coggs v. Bernard*, 1 Sm. L. C. 199, 8th ed., and notes *Ib.* 218; *Slim. v. Croucher*, 1 D. F. & J. 518; *Burrowes v. Lock*, 10 Ves. 470; *Yeoman v. Williams*, L. R. 1 Eq. 184; *Pulsford v. Richards*, 17 B. 87; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145, 162; *Blair v. Bromley*, 2 Phil. 354. At

any rate if the policy was not indisputable, the Loan Company should have called the plaintiff's attention to the fact: *Wyld v. Liverpool, &c., Ins. Co.*, 23 Gr. 442; *The Proprietors &c., of the English and Foreign Credit Co. v. Ardiun*, L. R. 5 H. L. 64; *Xenos v. Wickham*, L. R. 2 H. L. 296; *Parsons v. The Standard Fire Ins. Co.*, 5 S. C. R. 233; *Wood on Fire Insurance*, sec. 471.

J. E. Rose, Q. C., and *H. Macdonald*, for the Union Loan Company. We agree with the plaintiffs that the Insurance Company should be made to pay. Not having received the renewal receipt of the Royal Insurance Company, we rightly applied for insurance in the Union Insurance Company, and we are justified in assuming that the facts were the same as when the insurance was made in the Royal Insurance Company, as no change had been communicated to us by the plaintiffs, and as it was their duty to communicate any change which had arisen. We had no knowledge of any breaches of any conditions. The plaintiffs cannot sue on the policy, and at the same time seek to make the Loan Company responsible for neglect in procuring it: *Smith v. Hodson*, 2 Sm. L. C. 126; *Brewer v. Sparrow*, 7 B. & C. 310; *Lythgoe v. Vernon*, 5 H. & N. 180; *Valpy v. Sanders*, 5 C. B. 886; *Addison on Torts*, 5th ed., p. 46. There was no acting on the part of the plaintiffs on any representation of the Loan Company. There was no change of position owing to any such representation. Beside, the statement of the Loan Companies, that the policy was indisputable was true, since it could not be forfeited but by some act of the plaintiffs; and there is nothing showing the plaintiffs changed their position on the faith of the letter containing this statement.

J. Bethune, Q. C., and *A. Galt*, for the Union Fire Insurance Company. The conditions in our policy were broken by reason of the existence of other insurances of which we had no notice. We paid by virtue of the subrogation clause in the policy, and not *quâ* insurance. See *Parsons v. The Standard Fire Ins. Co.*, 5 S. C. R. 233; *Livingstone v. The Western Ins. Co.*, 16 Gr. 9. In effecting the iusur-

ance with us, the Loan Company acted as agents of the mortgagors, and our policy was a contract with the mortgagors, not with the mortgagees. The plaintiffs have elected to sue on this contract, and cannot now ask for it to be reformed, or say that there was no contract, so to get a return of the premiums. Where there is no written application, and a policy is issued with conditions requiring information, and that has not been given, the insured cannot sue; and if he sues on the policy, he must be taken to have adopted it with all conditions. *Livingstone v. The Western Ins. Co.*, *supra*, is not distinguishable from this case. See also *Burton v. The Gore District Mutual Fire Ins. Co.*, 12 Gr. 156; *Westmacott v. Hanley*, 22 Gr. 382; *Greet v. Royal Ins. Co.*, 5 App. 596; *Howes v. The Dominion Fire and Marine Ins. Co.*, 2 O. R. 89; *Carpenter v. The Providence Washington Fire and Marine Ins. Co.*, 16 Pet. 495; *The Mechanics' Building and Savings Society v. Gore District Mutual Fire Ins. Co.*, 40 U.C.R. 220, S.C., in App. 3 App. 151. The statutory conditions are imposed in the contract, and there can be no waiver without writing: *Merritt v. Niagara District Mutual Fire Ins. Co.*, 18 U. C. R. 529; *Marsh v. The Hartford Fire Ins. Co.*, 37 U. C. R. 437; *Lyndsay v. The Niagara District Mutual Fire Ins. Co.*, 28 U.C.R. 326; *Mason v. The Andes Ins. Co.*, 23 C.P. 37; *Bruce v. Gore District Mutual Ass. Co.*, 20 C. P. 207; *Weinaugh v. Provincial Ins.* 20 C.P. 509; *Fair v. Niagara District Mutual Fire Ins. Co.*, Co., 36 C.P. 398. The change that took place in the partnership of the firm was a material one; and so were the changes in the property in respect to mortgages material. I also refer to *The Citizens Ins. Co. v. Parsons*, L. R. 7 App. Cas. 96.

S. H. Blake, Q. C., in reply. No information was sought by the Union Insurance Company from the Union Loan Company. No notice was required to the Union Insurance Company of the existence of the insurance in the Royal; they were asked to insure in place of the Royal. As to the insurance in the Phoenix, this was only a substitution; *Parsons v. The Standard Fire Ins. Co.*, 5 S. C. R. 238. Either these were no representations, or there were only such

representations as are contained in the Royal policy. As the Union Loan Company was bound to apply the money to the mortgage debt, they could not give any higher right to the insurance company. I refer to *Wood* on Fire Insurance, sec. 161; *May* on Fire Insurance, 2nd ed., sec. 381; *The Dayton Ins. Co. v. Kelly*, 24 Ohio 345. The assignment of the mortgage to the Union Insurance Company was improper. The condition in the subrogation clause applies to something done after the issue of the policy. Here no act avoiding the policy was done after the issue of it, whereas in the cases cited by counsel for the Union Insurance Company there were acts done after insurance. There was no representation of the nature of the interests of the parties insured. It was not the partnership which was insured, but the individuals. Besides, to avoid the policy, the change must be to the prejudice of the insurance company: *Gill v. Canada Fire and Marine Ins. Co.*, 29 Gr. 341; *May* on Fire Insurance, 2nd ed., p. 571, sec. 381. The subrogation clause never came into effect, because the plaintiffs had done nothing avoiding the policy.

February 15, 1883. BOYD, C.—The insurance company rely upon three grounds of defence to defeat the plaintiffs' claim.

First, that the plaintiffs being insured under the name of Klein, Kalbfleisch & Co., it was not communicated to the company when the policy issued that Klein was no longer a member of the firm and had no insurable interest, which it is alleged was a circumstance material to be known by the company.

Second, that incumbrances, subsequent to the mortgage held by the defendants the Union Loan Company, existed upon the property prior to the issuing of the policy, a fact not communicated to the insurance company, and which it is alleged was an omission to communicate a matter affecting the risk.

Third, that there were existing prior insurances upon the same property, and that the defendants' assent thereto does not appear in or on their policy.

The distinguishing feature of this case is, that the insurance was effected by the Loan Company as mortgagees, under the power conferred upon them by their mortgage, which was in the statutory form, and no information was sought or obtained from the plaintiffs by either company. There was no application and no answers to questions according to the usual practice of insurance companies. A convenient general rule for such an exceptional manner of dealing is to be found in a judgment of the Supreme Court of the United States, in *Clark v. Manufacturers' Ins. Co.*, 8 How. S. C., at pp. 248, 249. "The relation of the parties seems entirely changed if the insurer asks no information, and the insured makes no representations. * * The governing test on it must be this: it must be presumed that the insurer has in such a case by person or by agent obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured being asked nothing, has a right to presume that nothing on the risk is desired from him."

The first and second heads of defence rest upon the first statutory condition to be found in the policy, and it is alleged that the non-communication of the cesser of Klein's interest in the partnership, and the non-communication of the state of the property as to incumbrances were breaches of that condition, as being omissions to communicate circumstances material to the risk, and to the prejudice of the company. This first condition is one which was commonly in use for a long time before the Ontario Legislature undertook to regulate the conditions of insurance. The same language was used in one of the conditions in *Pim v. Reid*, 6 Man. & Gr. 1, and it is there pointed out that its provisions exist for the benefit of insurers under the general law of insurance, so that the statute on this point is but an affirmance of the common law.

The first ground of defence in my judgment fails, both in law and in fact. The defence admits, as the facts are, that the policy issued to the three plaintiffs, as mortgagors,

under the firm name of Klein, Kalbfleisch & Co.; the objection is that Klein was no longer a member of the firm and had no insurable interest. The policy was issued on March 10th, 1879, and Klein retired from the firm on March 10th, 1880, but he was still liable on the covenants in the mortgage (which was made on February 21st, 1879,) and he had still the right to redeem the property, so that he had clearly an insurable interest in both respects. The insurance was not on a stock of goods, but on the buildings, machinery, and fixtures situate in Tavistock, as described in the policy. The other partners, Kalbfleisch and Poehlman, continued to be partners, and carried on the business as millers; and even if Klein had no interest at all, they could recover according to the extent of their interest. The rights of parties jointly insured, having different insurable interests, to recover as joint plaintiffs, is not questioned on this record: *Carruthers v. Sheddon*, 6 Taunt. 14; *McCormick v. Ferrier, Hayes & Jones*, 12; *Ebsworth v. Alliance Marine Ins. Co.*, L. R. 8 C. P. 596. Klein, under the policy with the Royal, which was presented to the insurance company by the loan company as the basis of insurance, had an insurable interest. And so long as no misrepresentation was made, and no questions asked as to his interest, he has the right to join in the action, and to recover according to his interest. That was the conclusion I arrived at in *Gill v. Canada F. & M. Ins. Co.*, 1 O. R. 341; and it is fortified by such cases as *Gilbert v. National Ins. Co.*, 12 Ir. L. R. 143 (1848); *Niblo v. North American Fire Ins. Co.*, 1 Sand. S. C. R. 551 (1848), and *Insurance Companies v. Thompson*, 95 U. S. 547.

But the facts do not shew that the failure to disclose Klein's change of position was to the prejudice of the company or was material to the risk. What little evidence there is has a contrary bearing. Klein's leaving the firm was well known to Gordon, the agent of the Royal, before he gave the renewal receipt, and he says "it was a thing I really did not take much interest in, as the policy was payable to a third party" McLean, the manager of the loan

company, received a letter on March 5th, before the policy issued, sufficient to notify him of the change in the firm if the slightest attention had been given by him to the interests of the mortgagors, and in his examination he admits knowledge, but establishes its immateriality. Thus he is asked: "As to the change in the firm, you say, if I mistake not, the Union were told by one of your clerks that the firm was changed, and that one of the clerks of the insurance said they did not attach much importance to that?" He answered: "Yes. I was not aware if the name of the company was changed, but there were different names to the letters." As the matter between the two companies seems to have been left to the under-clerks to deal with in the continuing of the insurance for the benefit of the mortgagees, a jury would, on this evidence, have little difficulty in finding that notice of the change, even if of moment, was communicated to the insurance company.

I pass to the next objection, which, in my opinion, also fails both in law and in fact. The question on this defence is, whether or not the failure to disclose that there were incumbrances on the property is within the language of the condition an omission to communicate circumstances material to the risk. In the absence of any definition by the dealings of the parties or by the scope of the interrogatories usually administered, the obvious meaning of the word "risk" in this condition is the hazard incurred or the exposure to danger from the thing insured against. Such was the opinion of Mr. Justice Patterson expressed in *Samo v. Gore District Mutual Ins. Co.*, 1 App. R. 545, and concurred in by Mr. Justice Armour, in *Sauvey v. Isolated Risk, &c., Ins. Co.*, 44 U. C. R. 532, and in addition to these I would refer to *Haywood v. Rogers*, 4 East., at p. 596; *Freeland v. Glover*, 7 East 457, and *Pim v. Reid*, 6 M. & G. 1. The opinion of Patterson, J., in *Samo v. Gore District Mutual Ins. Co.*, is not affected by the reversal of that case in the Supreme Court, and his conclusion therein I adopt as entirely applicable to the present line

of defence. These are his words: "I cannot assent to the doctrine that the existence of an encumbrance can, as a proposition of law, be pronounced a material fact with the necessary consequence that the omission to disclose it will, apart from stipulation, irrespective of its nature or amount, and without any imputation of fraudulent concealment, enable the underwriter to repudiate his liability:" p. 571. The expression of opinion by the present Chief Justice of Ontario in *Bleakley v. The Niagara District Mutual Ins. Co.*, 16 Gr., at pp. 201, 202 is not, I venture to think, in conflict with the right of the plaintiffs to succeed as against this defence. That was a case of mutual insurance, and by the terms of the statute regulating such insurances it became of great importance to know the state of the title as to incumbrances, because by sec. 67 the company had a statutory lien on the insured premises during the continuance of the policy.

His Lordship is careful not to pronounce upon what the result would be if the insurers had propounded a series of questions, and there was some material fact not contained within those questions, and left undisclosed in ignorance of its materiality (p. 202). Here we find, contrary to the usual practice, an entire dispensation with applications and interrogatories, and no statute giving notice to all the world that the existence of incumbrances is a material element of the insurance contract. In the language of Lord Mansfield, in the leading case of *Carter v. Boehm*, 3 Burr. 1905, the insured need not mention what the underwriter takes upon himself the knowledge of or what he waives being informed of. And again he says: "The question must always be whether there was, under all the circumstances, at the time the policy was underwritten a fair representation; or a concealment; fraudulent, *if designed*; or, though not designed, *varying materially the object of the policy and changing the risk* understood to be run."

Now, as put by Parke, J., in *Crowley v. Cohen*, 3 B. & Ad., at p. 487: "The particular nature of the interest is a matter which only bears on the amount of damages." It

is not the practice to particularize the exact nature of the applicant's interest in the absence of any inquiries on that head. If the company wishes to know the particulars of the nature and extent of the interest sought to be insured, it is proper for them to make the necessary inquiries. If they deem it material to ascertain the extent of incumbrances upon the property, it is no injustice to put on them the *onus* of indicating to the applicant that they do seek such information to guide them in their undertaking. Such is the law in the neighboring States, now well defined in the text books and more recent decisions. In *Phillips on Insurance* it is said: "If the subject or insurable interest is so described that the policy is applicable to it, *the assured is in general not required to disclose the particular nature and modifications of his interest*," 5th ed., sec. 588: and at the end of sec. 592: "The omission to state an incumbrance does not seem to be material, and to amount to a concealment, unless some inquiry or some representation made, or some provision or implication in the policy renders the disclosure material, as in the case of a lien for premium," *Ib.*, p. 316. The views of Mr. Phillips are cited with approval, and regarded as identical with those of the English law as to marine insurance by *Arnould*, 5th ed. 1877, pp. 22-53.

In *Flanders on Fire Insurance*, at p. 338, he states the law briefly thus: "A policy cannot be avoided for incumbrances, unless upon the applicant's false and fraudulent answers to interrogatories;" and further at p. 393: "Though an estate may be deeply incumbered, the party having a right to redeem has an insurable interest to the full value of such estate, and in effecting an insurance he is not bound to disclose such incumbrances unless inquired of or unless disclosure is required by a condition of the policy;" and see also p. 277 (ed. of 1871.) To the same effect is the law stated and very fully and ably discussed in *Angell on Insurance*, (1855) ch. 8, secs. 182-192. But perhaps the most elaborate as well as the most recent discussion of the whole question is to be found in 2nd vol. of the

American Leading Cases, 5th ed. (1871) at pp. 930-939, from which I extract the concluding passage: "There are, no doubt, points of which the insurers cannot reasonably be required to take notice, without some communication by the insured of a nature to rouse their attention and put them on their guard, but this cannot be said of the interest of the person who effects the insurance, which must necessarily exist in some form, and may consequently be made a subject of inquiry, without a preliminary disclosure. Hence if the insured are chargeable with negligence in remaining silent, the insurers are at least equally culpable, in not asking for information, and the case would seem to fall within the general principles, under which no one can hold another responsible for the consequences of a default or oversight, in which both have participated. This conclusion is strengthened by the silence of the English reports on a point, which could hardly fail to have been taken had it been thought tenable, either by the bench or the bar." Among the multitude of American decisions I refer particularly to the judgment of Mr. Justice Nelson in *Tyler v. The Aetna Fire Ins. Co.*, 12 Wend. at p. 512, which was affirmed on appeal in 16 Wend. 385, and of the more recent decisions to *Quarrier v. Peabody Ins. Co.*, 27 Am. R. at p. 592 (1877) and *Carson v. Jersey City Fire Ins. Co.*, 39 Am. Rep. 584, (1881,) and to a late English decision making in the same way as the great preponderance of American authority, namely, *MacKenzie v. Whitworth*, L. R. 10 Ex. 142, affirmed on appeal L. R. 1 Ex. Div. 36.

In another aspect of the case, it may be argued and held that the fact of the policy issuing without application or answer affords cogent evidence that information was waived as to the incumbrances, and that the company intended to insure regardless of the title. In such a case they will not be allowed to entrap an unsuspecting person who has throughout acted *bonâ fide*, by setting up a defence of concealment after the loss has occurred: *Sinclair v. The Canadian Mutual Fire Ins. Co.*, 40 U. C. R. 206; *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74; *O'Neil v.*

Ottawa Agricultural Ins. Co., 30 C. P. at p. 160, 161 ; *Butler v. Standard Fire Ins. Co.*, 26 Gr. 342, affirmed on appeal, 4 App. R.391.

But again, upon the question of fact there was no evidence given that from the circumstances of this case the omission to disclose as to the mortgages was a fact material to the risk, or that the rate of premium would have been affected by a knowledge of them on the part of the company. Without evidence, the Court cannot conclude this point against the plaintiffs, and least of all in a case such as the one now in hand. On the contrary the incidental matters which are proved rather lead to the conclusion that these subsequent mortgages were not material to the risk, *i. e.*, in the way of operating to induce some felonious act of incendiarism or the like on the part of the mortgagors. It appears that the mortgagors had paid \$1000 on the Union Loan Mortgage shortly (within a year) before the fire, and that the next subsisting mortgage was to Klein, the plaintiff, as one of the mortgagees. The mill was a going concern, and one would infer that it was for the interest of the plaintiffs to protect it from destruction as much as possible. It is also proved that they were anxious to resume work upon the same premises after the fire, and were delayed in their arrangements by the various objections and difficulties raised by this Insurance Company. Upon the evidence I am not prepared to find as a fact that the existence of these subsequent mortgages was material to the risk, and this is no case for inferring anything in favour of the company : *Parsons v. The Citizen's Ins Co.*, 43 U. C. R. 261. Upon the whole review of the facts and law, I think the right result is, there was no concealment and no omission to communicate material facts such as would invalidate the policy.

The third and last defence is one which arises upon the 8th condition of the policy, to the effect that the company is not liable if there is any prior insurance in any other company, unless the company's assent thereto appears in the policy or endorsed thereon. This objection, so far as

the letter goes, is well taken. There were two prior policies, one in the Mutual Fire Insurance Company of the City of Wellington for \$2,000 and one in the Phoenix for a like sum ; and no reference to either is to be found in or upon the policy sued on in this action. But the evidence clearly shews that this policy was to take the place of the policy in the Royal Insurance Company, and this was in pursuance of the manner of dealing between the two companies defendants. As put in McLean's evidence : " When the insurance in one company is to be superseded by one in the Union, the Loan Company merely produce the policy and allow the Insurance company to find out the facts for themselves ; and the custom was to take the old policies (*i. e.*, of the other company,) and give an insurance in their company on the same footing." Now when the insurance was with the Royal, they sanctioned prior insurances to the extent of \$4,000, with two other companies, as marked on the face of their policy, *i. e.*, with the Manufacturers and Merchants for \$2,000, and with the same Wellington Mutual for \$2,000. It is proved that the former company became defunct, and an insurance for the same amount was taken in the Phoenix as a substitution for this for three years. This change would be immaterial so far as the Royal was concerned under *Parsons v. The Standard Fire Ins. Co.*, 5 S. C. R. 234, and these two policies were current at the time when the renewal receipt of the Royal was rejected and the policy taken out in the defendants' company. As I understand what occurred at the trial, these changes both as to insurance and as to incumbrances, and as to change of partners being known to the Royal through their agent, Gordon, proof to that effect was dispensed with by the defendants' counsel. But whether this be so or not, the evidence is sufficient to shew that the Royal was insuring the plaintiffs upon the footing of there being additional insurance in two other companies for \$4,000 ; and this fact was made known to the defendants when the policy of the Royal was handed to them as the basis for insuring with them. It was then their duty

to have properly issued their policy, agreeing to take the position of the Royal, as was the bargain between the two companies defendants; and it was the duty of the Loan Company to see that this policy was properly issued and endorsed. In this, the Union Company, who undertook to act for the plaintiffs, failed. Had the pleadings properly presented the question, and asked for a reformation of the insurance policy, I do not see how it could be refused on the evidence before us; but this not being asked, the Union Insurance Company may be entitled to escape on the technical defence; which, however, only avails to the extent of \$1,000, the other \$3,000 being subject to different considerations, with which I will deal presently. But as to this \$1,000, the blame to have the policy rightly issued, rests with the Loan Company who undertook, by the very fact of their assuming to issue the policy to the mortgagors, to protect the interests of the latter by all reasonable precautions.

Not only did the Loan Company neglect this, but they also misrepresented the state of the insurance to the plaintiffs. Having applied for insurance to the Union Insurance Company, McLean writes to the plaintiff on March 3rd, 1880, saying: "I have renewed your policy in the Union for the same amount, viz., \$4,000. Please send cheque for premium \$120, and oblige."

This would imply that the "renewal" was on the same terms as before, whereas two changes had been made, *one* through the carelessness of the loan company in having no proper recognition made of the further existing insurances, and the *second* through the astuteness of the loan company to protect their own interests by getting the new insurance indisputable so far as their interest as mortgagees was concerned. Prior to the payment of the second premium on the new insurance, the plaintiffs ask for information about it, and McLean answers (March 14th, 1881) that "the policy as to the whole amount is indisputable on any grounds." After which, in pursuance of a request in that letter, the next payment of premium is made to the mort-

gagees. This was not according to the fact, and the representation is such as, in my opinion, the company is bound to make good, especially when the only difficulty in the plaintiffs' way to recover is occasioned by the neglect of the loan company (acting as the plaintiffs' agent) in not having the other insurances properly assented to on the policy: *Soule v. The Union Bank*, 45 Barb. 111, *S. C.*, 30 How. Pr. 105; *Slim v. Croucher*, 1 DeG. F. & J. 518; *Leather v. Simpson*, L. R. 11 Eq., at p. 406.

By a defence to the amended claim the insurance company also set up a prior insurance of \$4,000 in the Royal. The reference is to the renewal receipt issued by the Royal as of March 1st, 1880, and returned by McLean to be cancelled on March 3rd, which was forthwith done by Mr. Gordon. There is no foundation in fact for this defence. The policy in the defendants' company was instead of the one proffered in the Royal, and both were not intended to subsist or contemplated as subsisting together. Besides, the pleading does not present this issue. The defendants should be held to the letter of their defence, and what is therein alleged is, that this Royal insurance existed at the time of the issuing of the defendants' policy, and that was not till March 10th, before which the renewal receipt of the other company had been cancelled.

The next branch of the case is the claim of the insurance company to foreclose the mortgage as assignees of the loan company. To this claim there are two answers. First, the technical rules of pleading do not apply now to assist the insurance company, when they seek virtually as plaintiffs for relief on the footing of the mortgage against the plaintiffs. As my view is that the plaintiffs could recover on the policy but for the failure to have endorsed on it the two prior insurances for \$2,000 each, and that such omission would be remedied on a properly framed record, it follows that the insurance company cannot take advantage of their own default (in making the formal entry of assent on their policy), to bring into play the subrogation clause in the policy for their own advantage. That clause provides

that the insurance, as to the interest of the mortgagees, shall not be invalidated by any act or neglect of the mortgagors. But this policy was not in any sense invalidated by act or neglect of the mortgagors. No act of theirs has been done, and no neglect of theirs has, as against the company, disentitled them in equity to recover. The only neglect has been that of the company in failing to put proper endorsements of other insurance in or upon their policy; and it does not lie in their mouth to charge an omission of their own as a neglect which the mortgagors should have seen remedied: *National Fire Ins. Co. v. Crane*, 16 Md. 260; *The Lycoming Fire Ins. Co. v. Jackson*, 83 Ill. 302.

But secondly, and apart from this, I do not regard this case as governed by the case cited below, of *Springfield Fire and Marine Ins. Co. v. Allen*, 43 N. Y. 389.

That case is distinguishable on two grounds: first, the policy became avoided by the act of the mortgagor subsequent to the insurance in question; and, again, the Court lays special stress on the fact that the policy was made and accepted by the mortgagor personally intervening with full knowledge of all the terms and conditions, including the mortgage or subrogation clause. Here has been no change of circumstances since the policy issued, and there the whole arrangement was entered into between the two companies behind the back of the plaintiffs, who were not informed of the special privilege that the Loan Company had secured for themselves, and to whom the policy was never submitted for approval till after the loss had arisen. The policy was given to the Loan Company, insuring as mortgagees, at the expense of the plaintiffs, as the Insurance company well knew, and no precaution was taken to procure the plaintiffs' assent thereto. Now, I regard this policy as severable into two distinct parts, as is indeed well recognized in the American cases on this branch of v. the law. In *Springfield Fire and Marine Ins. Co. Allen*, *supra*, the Judge marks the distinction thus: "The mortgagee was equitable assignee of the policies, con-

taining a provision which, upon the happening of certain events, should absolutely vacate and avoid the insurance as of the property generally and as a contract of indemnity to the mortgagor, and resolve it into an insurance of the interest of the mortgagee as such, and make it a personal contract with her, in which the mortgagor would have no interest," p. 393, citing *The Columbia Ins. Co. of Alexandria v. Laurence*, 10 Pet. S. C. 507, and *King v. The State Mutual Fire Ins. Co.*, 7 Cush. 1 (the last being a decision the value of which is recognized by Mr. Justice Chitty, in *Castellain v. Preston*, L. R. 8 Q. B. D., at p. 622.) Therefore in effecting this insurance the mortgagees occupied a double character, in so far as they insured the property generally in the name of the mortgagees, as agents for the mortgagors; and in so far as they protected themselves by the special subrogation clause, as principals. This the insurance company knew, and indeed stipulated with the loan company to remunerate them by a commission of $12\frac{1}{2}$ per cent. on the premiums effected through their agency (*i. e.*, as mortgagees having the right to insure and charge over the premium to the mortgagor), as appears by the agreement of October 9th, 1879, between the companies, which was acted upon in this case by the receipt of the commission therein agreed upon. Now, as between the conflicting claims of the plaintiffs to have the insurance money applied in satisfaction of the mortgage, and of the insurance company to have the mortgage assigned to them as a security, preference should be given to the former in this case. The insurance company knew that the premiums were being paid by, or charged against, the mortgagor, and therefore that the equity of the plaintiffs was to have the policy moneys applied in reduction of the mortgage: *Dobson v. Land*, 8 Ha. 216, S. C., 4 DeG. & Sm. 475; *Russell v. Robertson*, 1 Ch. Ch. 72; *Provincial Ins. Co. v. Reesor*, 21 Gr. 296.

As between mortgagors and mortgagees this could not be changed or varied by any arrangement made between the mortgagees and a third party without the knowledge

or assent of the mortgagors. But the insurance company assumes to change this equitable right of the mortgagors by a private bargain between them and the mortgagees, for which they pay the mortgagees a commission of twelve and a half per cent. on the premiums, and of this by-bargain the plaintiffs knew nothing till after the loss. There is therefore a prior equity in the plaintiffs, which is not disturbed by the subsequent arrangement made between the defendants without the plaintiffs' privity. Effect can be given to the subrogation clause between the companies by the execution of an assignment of the mortgage, but this will not affect the right of the plaintiffs to contend that the mortgage, as a chose in action, passes subject to all equities: this among the rest, that it has been satisfied in the hands of the mortgagees by the receipt of moneys procured by means of premiums paid by the mortgagors. *Castellain v. Preston*, L. R. 8 Q. B. D., p. 617, shews that it is not necessary to go further than this to satisfy the term "subrogation" used in the special clause tacked on to the policy of the Union Insurance Company and in evidence in the case. Upon the general question I refer to *Waring v. Loader*, 53 N.Y. at p. 585, in which there appears to have been a private bargain for subrogation as in this case.

If it were necessary for the disposition of the case, I should also be inclined to hold that the plaintiffs were entitled to recover to the extent of \$3,250 upon another aspect of the case. That is based upon the offer of the insurance company to pay the amount of the mortgage \$3000, so that it should be satisfied, and a further sum of \$250 to the mortgagors in satisfaction of their claim. This distinctly appears as to the mortgage by a letter from the company of June 16th, 1881, and as to the further sum of \$250 the evidence leaves no doubt in my mind that the company agreed to settle on this footing, and that their offer was accepted by the plaintiffs. Besides this the company did not repudiate the claim when the proof papers were put in, but went on dealing with the plaintiffs, requiring further proof and demanding evidence as to value

and the like, which the plaintiffs went to expense and trouble to procure. These claim papers were placed in the hands of the insurance company in the middle of May, and all the matters on which they now rely to defeat this just claim were then fully and honestly disclosed by the plaintiffs. This was the time for the company to have repudiated the policy ; if they ever had the right to dispute their liability, then was the critical moment when they were put to their election. They elected to treat the policy as valid, to deal with the plaintiffs on the footing of there being an existing policy, to call for evidence and information which was otherwise unnecessary ; and they ended in the middle of August after having had all their doubts removed, all their objections answered, by offering unconditionally to pay \$3,250 in full of all claims. This, in my judgment is very cogent evidence going to establish an affirmation of the contract : *Morrison v. The Universal Marine Ins. Co.*, L. R. 8 Ex. 40 and 197, and specially at p. 203 ; *Greenfield v. The Massachusetts Mutual Life Ins. Co.*, 47 N. Y. 430 ; *Webster v. The Phœnix Ins. Co.*, 36 Wisc. 67 ; *Titus v. The Glens Falls Ins. Co.*, 81 N. Y. 410 ; *Insurance Co. v. Norton*, 6 Otto. 234.

The result is, that it should be declared that the mortgage has been paid, and that the proper discharge should be executed ; and that the loan company should pay the balance of insurance money to the plaintiffs, with interest from the time when it would be payable under the policy, and costs of suit to plaintiffs as against both defendants : without prejudice to the defendants litigating, as advised, their respective liabilities as between themselves.

PROUDFOOT, J., concurred.

[QUEEN'S BENCH DIVISION.]

CAUGHILL V. CLARKE.

Promissory note—Repeal of Stamp Act—Pleading—Amendment.

In an action on a promissory note, which at its making was not stamped, but had been double stamped before action, and after the repeal of the Stamp Act by the 45 Vic. ch. 1 D., the defendant denied the making of the note. At the trial Wilson, C. J., refused leave to plead insufficient stamping on account of the repeal of the Stamp Act, but the plaintiff was allowed to amend by adding allegations showing the consideration for the note, and gave judgment for the plaintiff.

Held, that the judgment was right.

Per HAGARTY, C. J.—The learned Judge was not bound to allow a plea of insufficient stamping to be added by way of amendment, under the circumstances.

Per ARMOUR and CAMERON, JJ.—The amendment should have been allowed.

Per ARMOUR, J.—The note even if unstamped or insufficiently stamped was admissible in evidence of the debt to the plaintiff, the Stamp Act not prohibiting such a use of it, and *McKay v. Grinley*, 30 U. C. R. contra, should not be followed.

Per HAGARTY, C. J., and CAMERON, J.—It is necessary, at all events since the Judicature Act, to plead specially want of stamps.

Per CAMERON, J.—The unstamped note was in its inception valid, but became invalid by neglect to stamp it. The repeal of the Stamp Act leaves the law where it was before those Acts were passed, and the note being originally a valid transaction is valid.

ACTION on a promissory note made by one William Clarke, deceased, on the 8th day of February, 1882, payable to the plaintiff's order three months after date. The defendant was the executor of the last will and testament of the said William Clarke, and was sued in that capacity.

The action was tried before Wilson, C. J., without a jury.

The statement of defence, among other grounds of defence not necessary to be noticed, as the evidence failed to support them, denied the making of the note by the testator; and the defendant at the trial moved to be allowed to add a further ground of defence to his statement, namely, that when the note was made and renewed by the plaintiff it had not affixed thereto the stamps required by law, and was therefore void. The note in fact appeared to have affixed to it stamps to double the amount of duty required.

These stamps appeared to have been affixed and cancelled on the 20th day of January, 1883, which was seven days before the commencement of the action. The learned Chief Justice refused to allow the amendment, as since the making of the note the statutes relating to stamps on bills and notes had been repealed. The repealing Act 45 Vic. ch. 1, D. came into force on the 4th day of March, 1882. This was after the making of the note, but before its maturity. The learned Chief Justice, however, allowed the plaintiff to amend his statement of claim by adding paragraphs shewing the consideration for the note, and directed judgment to be entered for the plaintiff for the amount of the note and interest.

May 28, 1883. *J. E. Rose*, Q. C., moved on behalf of the defendant, pursuant to notice of motion, to set this judgment aside on the following grounds: that there was no evidence to support the plaintiff's claim before amendment, the paper writing tendered to the Court as a promissory note not being receivable in evidence for want of a stamp; and for leave to amend his statement of defence by setting up that the note had not been duly stamped, the amendment having been improperly refused at the trial; and on the further grounds that the plaintiff was not entitled to recover on the amended statement of claim, as the therein alleged agreements were agreements respecting the sale of lands or an interest in lands, and were not in writing: that the evidence on behalf of the plaintiff was not corroborated, so as to entitle the plaintiff to succeed against the defendant, the executor of the party with whom the alleged agreements were made; and on the evidence given at the trial the judgment should have been entered for the defendant.

He contended that by the Stamp Act the note was invalid, and of no effect in law or equity, and not being double stamped before the repeal of the Stamp Acts, it could not now be validated. The curing Act, 46 Vict. ch. 21, is in defendant's favor. There is no evidence explaining

double stamping. Such evidence, if given, must be corroborated. *McDonald v. McKinnon*, 26 Gr. 12; *Regina v. Giles*, 6 C. P. 84, cited in *Regina v. Bannerman*, 43 U. C. R. 549; *Stoddard v. Stoddard*, 39 U. C. R. 203. The note cannot be given in evidence. It is invalid on its face.

A plea raising the question of want of stamps was unnecessary. There is no Canadian decision to the contrary: *Baxter v. Baynes*, 15 C. P. 237, and *Stephens v. Berry*, 15 C. P. 548, do not decide the point. In *Imperial Bank of Canada v. Beatty*, 4 A. R. 228, *Baxter v. Baynes* is referred to as an authority that the defence must be raised by plea. Reference to *Baxter v. Baynes* will, however, shew that that question was not decided.

MeKay v. Grinley, 30 U. C. R. 54, is a decision by Mr. Justice, now Chief Justice, Wilson, that there is no difference between the Dominion Statute declaring an unstamped note to be invalid, and the Imperial Statute.

Rule Hilary Term, 4 William IV., 1834, required that all matters which shewed a transaction to be void or voidable in point of law should be specially pleaded. This rule was continued and found in the Pleading Rules of 1853, Rules 6 and 8, and continued to the date of the Judicature Act, and Rule 141 of the Judicature Act merely declares that which all along had been law as to pleading. If necessary the amendment should have been allowed: *Johnasson v. Bonhote*, L. R. 2, Chy. D. 298, 300.

If the contract was illegal when it was entered into and the Statute which made it so was afterwards repealed, the repeal will not give validity to the contract unless it appears that the repealing enactment was intended to have a retrospective operation, and thus to vary the relation of parties: *Maxwell on Statutes*, page 379.

On the original consideration the defendant is entitled to succeed. The contract is not in writing and cannot be enforced: *Cocking v. Ward*, 1 C. B. 858; *Hodgson v. Johnson*, E. B. & E. 685; *Smart v. Harding*, 15 C. B. 652.

He also cited *McEowall v. Lyster*, 2 M. & W. 52; *Dawson v. McDonald*, 2 M & W. 26; *Field v. Woods*, 7 A. & E. 114.

Robinson, Q. C., contra.—If the note is avoided by statute and the penalty retained, the right to double stamp to save the penalty is also reserved. He referred to *Fowler v. Vail*, 4 A. R. 267; *Walker v. Walton*, 1 A. R. 579.

June 30, 1883. CAMERON, J.—In the view I take of the plaintiff's right under the promissory note it is only necessary to consider the objections to his right to recover by reason of the defective stamping.

The first question is, was the note admissible in evidence for any purpose? The general rule of law is, that the repeal of a statute makes it as if it had never been, in the absence of provision in the repealing Act to the contrary. In *Surtees v. Ellison*. 9 B. & C. 752, Lord Tenterden, C. J., thus expresses the rule: "It has long been established that when an Act of Parliament is repealed it must be considered (except as to transactions past and closed) as if it had never existed." In *Butcher v. Henderson*, L. R. 3 Q. B. 335, Blackburn, J.'s opinion was to the same effect, and stated the rule as follows: "The maxim alike of law and justice is *nova constitutio futuris formam imponere debet non præteritis*, and therefore though when a statute is repealed it is as to new matters as though it had never existed, yet, as to transactions already completed under it, it still has full effect."

There would thus seem to be no difficulty as to the general principle involved. It is in the application of the principle to the circumstances of the present case. Is this a transaction past and closed within the maxim stated by Blackburn, J.? His statement of the law, taken in connection with the facts to which it was applied, would seem to be adverse to the plaintiff's right to validate the note, assuming it to be invalid for want of stamps, by affixing stamps to double the amount of duty payable in the first instance. In that case the plaintiff had recovered a verdict for 40s. in an action of trespass, in which title to land came in question. The verdict, without a certificate for costs, did not under the statutes then in force carry costs, and before the plaintiff

obtained an order, which he was entitled to do for costs the statute authorizing the making of the order was repealed as well as that disentitling the plaintiff to costs. It was held the plaintiff was not entitled to costs, and a Judge could not make an order to give him costs. This decision is opposed to that of *Restall v. London and South Western Railway Co.*, L. R. 3 Ex. 141, and supports *Morgan v. Thorne*, 7 M. & W. 400, both of which cases were reviewed and considered by the Court, and the latter approved. If the order could not after the repeal of the statute be made for costs it would seem to follow the Court could not authorize the affixing of the double stamps, and *a fortiori* the plaintiff could not himself of his own mere motion affix them.

But this is not decisive of the case. The note in this case was not given on any illegal consideration, and but for the Act requiring the payment of a duty for revenue purposes it would be a perfectly good and legal transaction. During the last session of Parliament an Act was passed allowing in any suit at law, or in equity, then pending or thereafter to be brought, any promissory note or bill of exchange made before the 4th March, 1882, the time when the repealing Act took effect, to be given in evidence without the payment of double duty, provided it was proved and shown to the satisfaction of the Court or Judge that the circumstances and facts were such as would have entitled the holder to make it valid under the provisions of section 13 of chap 17, 42 Vict., by affixing stamps representing the double duty. The Act preserves the penalties incurred by the person who ought to have affixed the proper stamps and gives the defendant his costs in any case where, but for the Act, the defendant would have succeeded. The enactment is more against than it is in favour of the plaintiff, as it assumes the law to have been at the time it was passed against the validity of an unstamped note, and on the evidence at the trial there was nothing to show the plaintiff received the note under circumstances that would permit double stamping.

I have read the judgment of the learned Deputy Judge of the County of Victoria, in *Bradley v. Bradley*, reported in 18 C. L. J. 438, in which he has reviewed several of the authorities, which may be said to be very strong and in fact conclusive against the plaintiff, if the note at its inception had been tainted with an illegality, which was *malum in se*. But the absence of vice in the consideration sufficiently distinguishes the present case from those referred to by him.

Hitchcock v. Way, 6 A. & E. 943, in principle comes nearest to this case of any of the decided cases I have examined, and in that the original consideration was unlawful, being a gambling transaction within the statute 9 Anne, ch. 14, sec. 1, which made the bill absolutely void. There was no provision in the Act whatever by which validity could be given to it. Its repeal by 5 & 6 Wm. IV. ch. 41, making securities given subject to the same rule of law in the hands of innocent holders for value as notes made upon illegal consideration, was held not to affect the right of a *bona fide* holder of the bill who received it before the repealing Act was passed, and the bill was void in his hands. But the suit had been commenced before the repealing Act was passed. Here the note had not matured when the repealing Act came into force, and by it the duty itself having been removed, the plaintiff might from the impossibility of procuring stamps have been absolutely deprived of the right that he had under the existing law, if he could bring himself within it, of giving validity to it by the affixing of double stamps. The omission which affects the note was the omission of the defendant himself and under such circumstances he is not entitled to have the Stamp Act for his benefit alone made to work an injustice by a too rigid construction of the words of the Act declaring an unstamped note invalid and of no effect in law or equity. At the time of the trial there was no law that made an unstamped note inadmissible in evidence.

The Dominion Stamp Act in this respect differs from the Imperial Act. The latter prohibits the note or bill being

received in evidence for any purpose. Our Act prevents a recovery by temporarily invalidating the note or bill, unless stamped or double stamped in the manner indicated by the statute. As between the plaintiff and defendant the defendant had no right to require the plaintiff to put a stamp on. He had no interest in having a stamp put on. It would not benefit him. It was not in any respect part of the consideration for his promise evidenced by the note. His liability on the note by the operation of the Stamp Act was not destroyed or discharged, but suspended, and suspended not in his interest or for his protection, but in the public interest, and to prevent the revenue being deprived of a duty properly payable in respect of the note. The note, when he first put his name to it, was valid as between him and the plaintiff, both as a note and as evidence of an account stated, but it became invalid the moment after it was made by the defendant's neglect to stamp it, and till stamped during the continuance of the law it would no doubt have to be held that the plaintiff could not recover on it. But being on its inception a legal transaction untainted by illegality of any kind, I am of opinion the repeal of the Stamp Acts must in reference to the facts of this case be deemed to have left the law where it was before these Acts were passed. The interests of the public do not now require a different construction, and the revenue has gained not lost by the transaction. It would, too, be permitting the defendant contrary to the general rule of law, which prevents any one from taking advantage of his own wrong or neglect to set up such wrong as a defence.

If I am right in coming to this conclusion, it is unnecessary to decide whether the defence should have been pleaded.

I thought the point had been decided, but a reference to the cases cited on the argument shews that it has not been positively determined, though the Courts have inclined to that view. If the matter was involved in doubt before, since the Judicature Act it would seem to be

reasonably clear. By Rule 141 it is provided, "Where a contract is alleged in any pleading a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality or sufficiency in law, whether with reference to the Statute of Frauds or otherwise."

The reasons of the Lord Chancellor (Earl Cairns), in *Dawkins v. Lord Penrhyn*, L. R. 4 App. Cas. 58, why the Statute of Frauds should be pleaded, apply with even greater force to the Stamp Act. He said: "The Statute of Frauds must be pleaded, because it never can be predicated beforehand that a defendant who may shelter himself under the Statute of Frauds desires to do so. He may, if it be a question of agreement, confess the agreement, and then the Statute of Frauds will be inapplicable. With regard also to the Statute of Limitations, as to personal actions, the cause of action may remain, even although six years have passed. It cannot be predicated that the defendant will appeal to the Statute of Limitations for his protection. Many people, or some people, at all events, do not do so; therefore, you must wait to hear from the defendant, whether he desires to avail himself of the statute or not."

In addition to these reasons, all applicable to the Stamp Act, there is the further one that the plaintiff should have notice of an intention to set this matter of defence up, in order that the plaintiff may shew he is entitled to relief under the Act, either by shewing that he was in a position to affix the double stamp when he did, or that he has at the time of the trial the right to claim that privilege from the Court. If it ought to have been pleaded and constituted a valid defence, then I think the learned Chief Justice should have allowed the amendment asked. If the absence of the stamps constituted a legal bar to the plaintiff's remedy, the Court could not properly refuse to allow the defence to be set up. It has not a discretion, in my opinion, to deny leave to amend when the application is made so to do at or before the trial, where the amend-

ment will present a complete answer to the action; and the injustice of the legal bar signifies nothing, unless some equitable principle applies, which will prevent such injustice, and that would be the proper subject for a replication to the defence, not a ground for refusing the amendment.

I do not think there is anything in the objection taken on the motion, that there was no corroborative evidence in respect of the agreement for the sale of the plaintiff's interest, which was the consideration for the note. But I base my opinion of the plaintiff's right to hold the judgment he has obtained on his right to recover on the note, the making of which being both proved and admitted, the question of corroboration does not affect his right.

HAGARTY, C. J.—I agree that our judgment should be for the plaintiff. I do not agree that the learned Chief Justice was bound to allow the plea as to deficient stamping to be pleaded. At all events since the Judicature Act it would be necessary to plead the want of proper stamping.

The imposition of stamps was purely for revenue purposes. The Legislature repealed the law as to all notes made after a named day, which happened to be during the currency of this note, and again by a subsequent Act relieved the parties on a note like this from the necessity of double stamping, if under the former law such a proceeding would have been allowed.

Here the defendant in framing his defence could have fully ascertained whether the Stamp Acts had or had not been complied with, and could have obtained inspection of the note. He puts in no such defence.

I am not prepared to say that with the law as to stamps in the state in which it was at the time of trial, the Chief Justice was bound to allow such a plea to be added.

Even now I presume we could, if necessary, call for evidence to bring the case within the law allowing double stamping, or to prove that the double stamps now appear-

ing on the note were not affixed as soon as the parties ascertained their necessity, and without any design to defraud the revenue.

ARMOUR, J.—In my opinion all such amendments should be made in every case as either party may require, in order that the matter in dispute may be fully and fairly tried.

I think, therefore, that the amendment asked for by the defendant at the trial should have been, and should now be allowed; and that the plaintiff should have been, and should now be allowed to amend by adding counts on the consideration for the note, and on an account stated.

If the defendant's counsel is right in his contention that an unstamped promissory note cannot be given in evidence, then the defendant did not, and does not require the amendment asked for by him, but the plaintiff required, and requires the amendment above suggested.

The defendant denied the making of the note; and in order to prove the making of it the plaintiff was obliged to give the note in evidence, and if being unstamped it could not be given in evidence, then the plaintiff must have failed on that issue.

The Dominion Act imposing duties on promissory notes and bills of exchange merely provides that an unstamped instrument such as those mentioned in the Act shall be invalid and of no effect, in law or in equity; and I do not think that the Legislature ever intended by these words to prohibit such an instrument being given in evidence.

The English Stamp Acts, under which it has been held that unstamped instruments cannot be given in evidence, all contain much wider words than these, and some of them expressly provide that such instruments shall not be given in evidence. The decisions under these Acts cannot therefore be authorities under the Dominion Act.

The case of *McKay v. Grinley*, 30 U. C. R. 54, is opposed to my view, but I think that case was not well decided, and ought not to be followed.

It is not giving any effect to such an instrument to use it as evidence: it is giving effect to what it is evidence of; and the cases are numerous in which instruments invalid and of no effect in law or in equity have been held to be admissible nevertheless as evidence.

In this view, assuming all the amendments made, the plaintiff is entitled to recover, as this unstamped note was sufficient evidence upon the account stated, and was sufficiently corroborative of the plaintiff's evidence as to the consideration for the note to entitle him to recover upon these counts.

Judgment for plaintiff.

[QUEEN'S BENCH DIVISION.]

STAR KIDNEY PAD COMPANY ET AL V. GREENWOOD.

*Sale of medicinal composition—Representation as to curative properties—
Discovery of ingredients.*

In an action on a promissory note given by the defendant to the plaintiff in payment of a quantity of pads made by the plaintiffs, and said to possess curative properties when applied to the body, the defence was, that the note was obtained by fraud and that the pads purchased were useless and possessed no healing properties. The defendant demanded production and discovery of the formula or recipe from which the pads were made, in order to show that they were valueless, which the plaintiffs refused on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, and that discovery would injure them in their business.

Held, that the defendant was not entitled to the discovery.

JUNE 22, 1883. This was a motion by *Osler*, Q. C. on behalf of the defendant, to dismiss the action, of the plaintiffs as for want of prosecution, under the statute in that behalf, on the ground that the plaintiff Walton had failed without sufficient excuse to comply with the order for his examination, and for the discovery and inspection of the documents in his possession and control, in having refused, when questioned in the course of his examination under an order in that behalf, to discover, disclose, or produce the formula or receipt for the manufacture of the Star Kidney Pad, and also to produce the various documents and papers set forth in the notice to produce served upon the plaintiffs.

The action was brought by the plaintiffs, the Star Kidney Pad Company, on a promissory note made by the defendant in their favour, for the price of certain goods called Star Kidney Pads manufactured by the plaintiffs—three gross, and one gross of Dr. Leckie's Periodical Pills—of which note the plaintiff Walton became and was at the time of his examination the beneficial owner, having purchased from the plaintiffs, the Star Kidney Pad Company, their business, including the note in question. On the examination of Walton he declined to produce the formula or recipe from which the Star Kidney Pad was

made and to give a description of the method of manufacture, or to state what were the ingredients composing the pad, on the ground that the composition was valuable and a secret, and having no patent for the manufacture or discovery it would be injurious to him to make the disclosure sought. He also refused to produce the books of the company containing letters or copies of letters or communications written by the company or its officials in reference to their accounts.

The defendant on his examination stated that he was induced to purchase the pads by the representations of the agent of the plaintiffs, none of which representations related to what the pad was made of.

The defence set up to the note was, that it was obtained by fraud, and that the pads purchased were in fact useless and of no curative or healing properties; and the defendant contended that he had a right to know of what they were composed, in order to shew that the pads were valueless. The plaintiffs, on the other hand, contended that the defendant was not induced to buy from any representations as to the composition of the pad, and it would be injurious to the plaintiffs in their business to be compelled to disclose the secret of the composition.

Bethune, Q. C., contra.

September 4, 1883. CAMERON, J.—I think that the plaintiffs' contention is right, and the defendant has no right to the discovery sought. It could scarcely serve any beneficial purpose for him to have a knowledge of the composition in making out a defence, for it seems to me it would be impossible for any one with certainty to say, should the ingredients prove of the simplest character, creating no new substance in combination, that they might not be beneficial when applied to the human body in effecting relief from pain, or in promoting some chemical action in the system beneficial in some ailments. That question would have to be solved by the experience of the sufferer rather than the skill of an expert, and the composition

of the pads having formed no part of the inducement of the defendant to buy them, I have not been able to see how the ends of justice can be served by compelling the plaintiffs to make disclosures that may destroy their business by enabling any one without their assistance to make the pad, be it never so useful in the cure of disease, and this would, in that event, work manifest injustice.

The observations of Lord Hatherley, Lord Chancellor, in *Moore v. Craven*, mentioned in a note to *Carver v. Pinto Leite*, L. R. 7 Chy. 96, are pertinent to the present case, and denote that I properly decline to grant the defendant's motion. He said: "The Court does not, when discovery is a matter of indifference to the defendant, weigh in golden scales the questions of materiality or immateriality; but where the nature of the discovery required is such that the giving of it may be prejudicial to the defendant, the Court takes into consideration the special circumstances of the case, and whilst, on the one hand, it takes care that the plaintiff obtains all the discovery which can be of use to him, on the other, it is bound to protect the defendant against undue inquisition into his affairs. The question of materiality must be tested by reference to the case made by the plaintiff's pleadings, and to what will be in issue at the hearing." Sir W. M. James, L. J., in *Carver v. Pinto Leite*, L. R. 7 Chy. page 97, in reference to this language of Lord Hatherley, says: "Generally speaking, as the Lord Chancellor, if I may venture to say so, well expressed it, the Court does not weigh in golden scales the materiality or immateriality of the discovery in considering whether the rule is to be applied—that he who discovers at all must discover fully; but, as he goes on to say, there are cases in which it is important that the Court should so weigh it, namely, cases in which the discovery is such as the plaintiff, though failing at the hearing, may afterwards use in a way prejudicial to the defendant. In such cases it is important to consider whether the discovery is material for the purpose of enabling the plaintiff to establish his case at the hearing, or material only for the subsequent purposes of the suit, in

case the plaintiff should succeed. I am not at all disposed to grant discovery when I am satisfied it is likely to be injurious to the defendant, and am not satisfied there is any real prospect of its being of material service to the plaintiff at the hearing."

In this case the defendant's defence does not depend upon the composition of the pad, as I have already said, as its composition was in no sense a part of the consideration for the purchase of the pads or the giving of the note. A knowledge of the composition could prove beneficial to the defendant in his defence only upon the contingency that an expert could be found who would pronounce the components singly or in combination valueless as a curative agent, and thus aid extraneous evidence of its worthlessness, if such could be produced, in cases where the pad had been used, and so support the falsity of the representations of its value at the time of sale. I do not think this possible contingency sufficient to warrant the Court to exercise its power to compel a discovery where the disclosure may very seriously injure the plaintiffs' business. The authorities I have so largely quoted from are clearly against the exercise of the power in the present case, either as to the compelling the plaintiffs to answer as to the composition of the pad, or to produce the letters or communications of their customers, or those written to such customers in relation to their dealings in respect of the pads. This application must, therefore, be dismissed, with costs to be costs in the cause.

Application dismissed.

[QUEEN'S BENCH DIVISION.]

McKNIGHT V. THE CITY OF TORONTO.

Municipal by-law—Nuisances—Prohibition against keeping swine and cows—Validity of.

The defendants passed a by-law pursuant to R. S. O. ch. 174, sec. 466, sub-sec. 17, as amended by 44 Vic. ch. 24, sec. 12 which by-law, by sec. 2, provided that "No person shall keep, nor shall there be kept within the city of Toronto any pig or swine or any piggery."

Held, that the by-law was *ultra vires*, as being a general prohibition against the keeping of pigs, and not restricted to cases that might prove to be nuisances.

By sec. 3, sub-sec. 2, the by-law provided that no cow should be kept in any stable, &c., situate at a less distance than forty feet from the nearest dwelling house, and where two cows were kept that the stable should not be less than eighty feet from the nearest dwelling house.

Held, that it was unnecessary to declare expressly that the keeping of cows within such distances was or might be a nuisance, but that the prohibition was in effect such a declaration, that the distances prescribed were reasonable, and that the by-law as to that was unobjectionable.

Seemle, that it was not bad in being so generally expressed that it would restrict the owner from keeping cows within the prescribed distances of his own dwelling house, and

Held, that this objection not being clear should not at any rate be allowed to prevail in favour of the applicant, whose case was not shewn to be within the terms of the objection.

JULY 5, 1883, *Read*, Q.C., obtained an order *nisi* on the city of Toronto, to shew cause why By-law No. 1231 of the city of Toronto, in whole, or clause two and clause three, sub-section two, should not be quashed as not conformable to law, being in restraint of trade and commerce; and because section two and sub-section two of section three did not, nor did either of them express therein, nor did the by-law explain that the keeping of the said cows or pigs swine or piggery, or any of them, should be punishable, and punishable only in case the keeping of the same should prove to be a nuisance; and because the said sub-section two did not state whether or not the dwelling house therein mentioned was not to apply to the dwelling house of the person keeping the said cows, &c.; and why the city of Toronto should not pay the costs of this application.

On the 7th of September, 1883, *Read*, Q. C., supported his motion.

Section 2 provides that "No person shall keep, nor shall there be kept within the city of Toronto, any pig or swine, or any piggery."

Section 3, sub-section 2, provides that "No cow shall be kept in any stable, byre, yard, or other enclosure (pasture lands and paddocks excepted), situate at a less distance than forty feet from the nearest dwelling-house, and where two cows are kept the stable or byre shall not be situated at a less distance than eighty feet from the nearest dwelling house."

The by-law was passed on the 7th of August, 1882, and was made under the provisions of the R. S. O., ch. 174, sec. 466, sub-sec. 17, with the addition made to that sub-section by the 44 Vic., ch. 24, sec. 12. Sub-secs. 15, 16, 17, the one in question, 18 and 19, are classed together under the heading of *nuisances*.

Then sub-section 17, as it stood under R. S. O. ch 174, sec. 466, read as follows: "For preventing or regulating the erection or continuance of slaughter houses, gas works, tanneries, distilleries, or other manufactories or trades which may prove to be nuisances;" and the addition made to it by the Act of 1881 is as follows: "Including the keeping of cattle and pigs or swine, and cattle, or cow-byres and piggeries."

The enactments are directed against *nuisances* only, because the different matters in these sub-sections are ranged under the head of *nuisances*; because also the first enactment under that heading is sub-sec. 15, "For preventing and abating *public nuisances*"; and because also sub-sec. 17, as before stated, expressly declares that the different matters contained in it are only to be prevented or regulated in case they "may prove to be nuisances." He referred to *The Queen v. Osler*, 32 U. C. R. 324; *Re Nash v. McCracken*, 33 U. C. R. 181; *Everett v. Grapes*, 3 L. T. N. S. 669; *Ellwood v. Bullock*, 6 Q. B. 383; *Hayward v. Horner*, 5 B. & Ald. 317; *Cullen v. Butler*, 5 M. & S. 465.

The by-law is also bad because it is expressed so generally that the owner of the cattle is not allowed to keep

them within the prescribed distance of his own dwelling house, where they cannot, so long as he is willing so to keep them, be either a public nuisance, or a nuisance at all.

McWilliams shewed cause. The power conferred upon municipal bodies in matters of this kind is not only to prevent but to regulate, and this by-law is one of regulation so far as the keeping of cows is concerned. It is not necessary the matters provided for should be nuisances, so long as they are of the nature that they may prove to be nuisances. The by-law is rightly directed against the owner of cattle keeping them within the prohibited distance of his own dwelling house, as well as within such distance of the dwelling of another person as that the health of the occupants of the owner's house may be affected, and the act may be a nuisance to them, although the owner does not complain of it. He referred to *Harrison's Mun. Man.* last ed. pp. 213 to 216, 243-244, 424 to 427; *Dillon* on *Mun. Corp.*, 3rd ed., secs. 317, 319, 320, 322 to 326, 328, 347, 365, 369, 379, 420, 421; and to *R. S. O.* ch. 174, sec. 322—to shew the by-law might be quashed only in part.

Read, Q. C., in reply, cited *Banbury Urban Sanitary Authority v. Page*, 8 Q. B. D. 97; *Re Davis v. Municipality of Clifton*, 8 C. P. 236, and to *Harrison's Municipal Manual*, secs. 424, 427.

September 14, 1883. WILSON, C. J.—The municipal enactments are made as well for preventing and abating public nuisances, as for preventing or regulating such acts, erections, and kinds of buildings as in their nature are or are likely to be nuisances; for instance, common begging in the streets, ringing of bells, or making unusual noises in public places, the firing of guns, and the like may be prevented, and some of them may also be regulated. The construction of privy vaults may not only be regulated but prevented, and yet their construction may be proper and necessary. Their construction should not therefore be prevented unless they are likely to be a nuisance.

So also the power of prevention should not be exercised

against the erection or continuance of gas works, slaughter houses, &c., &c., or other manufactories or trades, unless they are or are likely to prove nuisances, and so the statute expressly in the 17th sub-section declares. Now, in that sub-section "the keeping of cattle and pigs or swine, and cattle or cow byres and piggeries," is placed upon the same footing as the erection or continuance of gas works, &c., &c.; that is, they are only to be prevented or regulated in case they "may prove to be nuisances."

If slaughter houses are only to be prevented or regulated if they "may prove to be nuisances," the keeping of cattle, &c., should be subject to the latter qualification, and I think that is so.

It must depend very much upon the site where these erections are, or where these factories or trades are carried on, or where the cattle or pigs are kept, or are to be kept, whether they will prove to be nuisances or not. That which would be a manifest nuisance in a crowded thoroughfare, as, for instance, a slaughter house or tannery, on account of the offensive smell, &c., proceeding from it; or a large factory which was carried on with much noise, or which required vans and other conveyances to be constantly standing at its doors on the street, or constantly crossing the crowded sidewalks, or where there was a very frequent deposit of goods on the sidewalks which seriously impeded their usefulness or safety for foot passengers, might not be a nuisance if carried on in an isolated situation or in a sparsely peopled or little frequented part of a city or town, but would be an intolerable nuisance if carried on in a densely peopled or crowded thoroughfare. There are parts of the very extensive area forming the city in which a slaughter house, or tannery, or the keeping of cattle, would not be a nuisance.

It is notorious that cattle are kept in very large numbers in this city in extensive sheds erected for the purpose, but whether they have proved to be a nuisance or not those who reside in that locality, or who have to pass within half a mile of it, will be able to say.

Now, these sheds are maintained and are permitted by the city authorities on the assumption that they are not a nuisance. A general prohibition, therefore, against the keeping of pigs within the city, although the keeping of them is not pretended to be a nuisance, cannot be maintained. There are parts of the city in which pigs might be kept—not, of course, in any numbers, but to a certain number—which are situated at a considerable distance from any dwelling house or thoroughfare, and where the keeping of them could not possibly be a nuisance, and yet this section is a total prohibition, nuisance or no nuisance. The second section of the by-law must, therefore, be quashed.

The third section is not prohibitive, but regulative. Cows are not, in their nature, so offensive as swine, and there is almost a necessity they should be kept within the limits of the city. The section is framed upon that assumption. The regulation is, that a single cow shall not be kept in any stable, byre, yard, or other enclosure (pasture lands and paddocks excepted) situated within a distance of forty feet from the nearest dwelling house, and if two cows are kept the stable, &c., shall not be at a less distance than eighty feet from the nearest dwelling house. The keeping of cows near to a dwelling house may be a nuisance, and there is the power to provide against such buildings, trade, or business which may prove to be a nuisance. It is not necessary the by-law should have declared the keeping of cows within these distances from dwelling houses was or would be, or might be a nuisance, or in the words of the statute was such an act as “may prove to be a nuisance,” although it might, perhaps, have been neater draftmanship to have done so.

The fact that the by-law passed under the sections of the statute relating to nuisances specifies those distances as the nearest limit under which byres, &c. shall be placed or kept with regard to dwelling houses, is in effect a sufficient declaration that if they are placed or kept at a less distance they may prove to be nuisances. The distances

specified must be such that this Court can say whether they are reasonable or not, or whether they are not in effect prohibitive.

It would not be reasonable to say that no cow shall be kept in the city within a quarter of a mile of any dwelling house or public thoroughfare, nor perhaps within the eighth of a mile, or 660 feet, nor perhaps within a less distance than that; and probably the by-law might be quashed on that ground, if the Court were satisfied the keeping of a cow at such a distance from a dwelling house or other place could not prove to be a nuisance.

But this by-law is not open to that objection, for the distances of forty feet and eighty feet are most reasonable distances, and within which, in the exercise of our ordinary experience, judgment, and knowledge, the Courts can say the keeping of a cow or cows may prove to be a nuisance. The second sub-section of the third section of the by-law cannot be quashed upon that ground.

But, it was contended, this by-law is so generally expressed that it restricted the owner of the cows from keeping them within such distances of his own dwelling house, and that such keeping could not be a nuisance. The by-law is so expressed, but I am not disposed to set it aside on that ground, at the instance of any one whose case is not within the terms of that objection, and who is not proceeded against expressly in respect of it.

I am not, however, certain the by-law is objectionable for that cause. The owner may not personally find the keeping of cows within forty feet of his dwelling house to be a nuisance, but others who have the right to go to the house, as the assessor, the tax collector, perhaps the sheriff or bailiff, or the postman, might find it so.

However that may be, I shall not set aside this section of the by-law, because I am not sure it is an objection, for the reasons just stated; and because the by-law is framed upon the assumption that the cases provided for are or may be nuisances, and an owner having his dwelling house within the prescribed distance may be said not to be within

the terms of the by-law ; and because also the applicant does not pretend his case is within the terms of this objection, and I do not think he is entitled to the benefit of a not very obvious objection, it it be one.

I shall, therefore, make the order quashing the second section of the by-law, and discharge the residue of the order to shew cause, giving to each party the costs of that portion of the order on which each of them has respectively succeeded.

Order accordingly.

[QUEEN'S BENCH DIVISION.]

IN RE THE CANADA ATLANTIC RAILWAY COMPANY AND THE
CORPORATION OF THE TOWNSHIP OF CAMBRIDGE, IN RE.

Municipal Corporation—Railway aid—Debentures—Mandamus.

Held, following the decision of the Supreme Court of Canada, *In re Grand Junction Railway v. Peterborough*, (not yet reported), that a writ of mandamus to compel the issue of debentures by a municipal corporation under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action.

THIS was a motion for a writ of mandamus to compel the corporation of the township of Cambridge forthwith to issue debentures of the corporation for the sum of \$20,000, with coupons thereto attached for payment of interest, in accordance with the terms of a certain by-law of the corporation, entitled "A By-law to aid and assist the Canada Atlantic Railway Company by granting the sum of \$20,000 to the said company by way of bonus, and to issue debentures therefor, and to authorize the levying of a special rate for the payment thereof," and to deliver the said debentures and coupons to the railway company.

The motion was argued by

McCarthy, Q.C., and *Gormully*, for the railway company,
and by

MacLennan, Q.C., for the township.

July 31, 1883. OSLER, J.—When this motion was argued I said to the counsel who appeared in it, that the decision of the Supreme Court of Canada, in the case of the *Grand Junction R. W. Co. v. The County of Peterborough*, which had just been announced, might possibly be found to affect the right of the applicants to obtain the writ of mandamus upon motion on the facts disclosed by the affidavits, and I withheld my decision in hope that the judgment, an extremely important one, as bearing upon a practice which had certainly come to be

regarded in our Courts as somewhat settled, would be speedily reported. No report of the case in the Supreme Court has however yet appeared, and the parties having asked for judgment, I required them to furnish me with an authentic extract from that part of the judgment of the Supreme Court which deals with the point in question.

Upon reading the extract it appears to me that the judgment of the Court so far proceeds upon the ground that the prerogative writ of mandamus, or a writ obtainable upon motion, under R. S. O. ch. 52, sec. 17, is not the proper method of compelling the delivery of debentures granted by a municipal corporation to a railway company under such a by-law as that in question here, that it would be improper for me, sitting as a single judge, to grant the writ in the present case. Indeed I may say, looking at the opinions of Gwynne, Fournier, Taschereau, and Henry, JJ., that the point appears to have been expressly decided adversely to the applicant. It therefore becomes unnecessary, and would not be right for me to express any opinion upon the questions, some of them extremely interesting and important, which were discussed on the argument. I leave the parties to proceed by way of action for mandamus—*Fotherby v. Metropolitan R. W. Co.*, L. R. 2 C. P. 188; *Morgan v. Metropolitan R. W. Co.*, L. R. 4 C. P. 97—or to rehear this motion before a Divisional Court or the Court of Appeal, if they think they can satisfy one of those Courts that it is distinguishable from the *Grand Junction Case*.

Meantime I dismiss the motion, but under the circumstances I think it should be without costs.

Motion dismissed, without costs.

[QUEEN'S BENCH DIVISION.]

RE WOLVERTON AND THE TOWNSHIPS OF SOUTH AND
NORTH GRIMSBY.

High school district—By-laws annexing parts of two municipalities—Repeal.

In 1879 the township of Grimsby passed a by-law attaching a certain portion of the township to the village of Grimsby for high school purposes. In 1881 the same council similarly annexed another portion. Corresponding by-laws were passed by the village of Grimsby. By 45 Vic., ch. 33, O., the township was divided into two townships of North and South Grimsby. In 1882 the council of the township passed a by-law, on the petition of less than two-thirds of the ratepayers, repealing the two former by-laws.

Held, that the two township by-laws, with the corresponding village by-laws, formed an agreement, pursuant to R. S. O., ch. 205, sec. 30, as amended by 42 Vic., ch. 34, sec. 32, which could not be rescinded by one of the municipalities without the concurrence of the other; and therefore that the repealing by-law should be passed only upon the petition of two-thirds of the ratepayers.

ON the 26th June, 1879, the council of the township of Grimsby (then composed of what afterwards formed South Grimsby and North Grimsby), passed by-law No. 283.

It recited that the council had been required by over two-thirds in number of the taxpayers of the first five concessions, and of that part of the sixth concession lying west of the Grimsby and Smithville Stone road, to attach them to the Grimsby High School for high school purposes, and that the Amended High School Act of 1879 provided that such requirements should be passed by the council receiving such petition signed by two-thirds in number of all the taxpayers of such portion, and that it was desirable and right to grant the petition. The by-law then enacted that on and after the passing of the by-law the aforesaid part of the township should be and the same was thereby attached to the Grimsby High School for high school purposes, and subject to all the provisions and requirements of the High School Act.

On the 30th of April, 1881, the council of the township of Grimsby (then composed of what afterwards formed South Grimsby and North Grimsby), passed the by-law

No. 295. It recited that a two-third majority of rate-payers of certain lot sin East Gore, viz., A, B, C, D, E, L, M, N, and O, had petitioned to be attached to Grimsby High School for high school purposes; and therefore the council enacted that from and after the passing of the by-law the said lots were thereby attached to the Grimsby High School for high school purposes, and subject to all the provisions and requirements of the High School Act.

On the 16th of December, 1882, the council of the township of Grimsby (then composed of what afterwards formed the township of South and North Grimsby) passed the by-law No. 315, reciting that certain ratepayers of the township had petitioned the council to repeal by-laws Nos. 283 and 295. It was thereupon enacted that the said by-laws should be and the same were thereby repealed.

By the 45 Vic., ch. 33, O., the township of Grimsby was divided into two townships of North Grimsby and South Grimsby.

On the 4th of September, 1883, *Aylesworth*, for Wool-verton, the applicant, obtained an order calling on the townships of South Grimsby and North Grimsby to shew cause why the said by-law, No. 315, should not be quashed, with costs to be paid by the townships of South and North Grimsby, or by one or other of them, upon the following among other grounds:

1. The by-laws assumed to be repealed formed, under the High School Act, the agreement on the part of the portions of the township of Grimsby described in the said by-laws with the village of Grimsby, to constitute the said portions of the township and the said village into one high school district; and it was not competent or within the power of the council of the township of Grimsby, of its own mere motion, to rescind such agreement after it had been entered into and acted upon.

2. It was not obligatory upon the council of the township of Grimsby to pass the by-laws assumed to be repealed, although petitioned for, and therefore it was *ultra vires*

the council to repeal them of its own motion, or against the wish of such tax-payers.

3. The by-law 315 was one discontinuing in effect a high school district theretofore existing, and in that respect was not warranted by the authority of any statute.

4. The by-laws assumed to be repealed constituted, with the corresponding by-law of the said village, an agreement that could not be varied or rescinded by one of the two contracting parties without the assent of the other.

5. The said three by-laws affected only portions of the township of Grimsby which were then wholly within the limits of North Grimsby, and the by-law 315 was passed by the council of the township of Grimsby after the passing of the 45 Vic. ch. 33, providing for the division of the township of Grimsby into two municipalities.

Notice of motion was also served by the said applicant to the like effect of the order *nisi*.

On the 14th of September, *Aylesworth* supported his motion and order.

Muir shewed cause for the two townships of North and South Grimsby.

The following references were made: 42 Vic. ch. 34, sec. 32, O.; R. S. O. ch. 205, sec. 55; *Re Misener and the Township of Wainfleet*, 46 U. C. R., 457; 40 Vic. ch. 16, sec. 18, and sub-secs., O.; R. S. O. ch. 174, sec. 336; R. S. O. ch. 1, sec. 8, sub-sec. 35; *Re Tyrrell and County of York*, 35 U. C. R. 247; R. S. O. ch. 174, sec. 229, and 46 Vic. ch. 18, sec. 235, O.

As to delay in application: *Re Great Western R. W. Co. and North Cayuga*, 23 C. P. 28; R. S. O., ch. 174, sec. 333.

September 18th, 1883. WILSON, C. J.—The question is whether the township of Grimsby had authority to repeal the two by-laws, 283 and 295.

By 37 Vic. ch. 27, sec. 39, O., the county council were empowered to form a village or town, and the whole or part of one or more adjoining townships within its juris-

diction, into a new or additional high school district in the county—that is, in addition to the high school which the county was required to have by section 35. Such additional high school district, however, by sec. 40, sub-sec. (a,) required the recommendation of the Chief Superintendent of Education and the order of the Lieutenant-Governor, before it could be created. Section 39 was amended by 40 Vic. ch. 16, sec. 18, sub-sec. 3, which provided “that county councils under certain restrictions might establish one or more additional high schools in the county.” By section 37 the county council, with the authority of the Lieutenant-Governor, on the recommendation of the Chief Superintendent of Education, could discontinue any high school in the county within the jurisdiction of the county council at the end of the then civil year.

By 40 Vic., ch. 16, sec. 18, sub-sec. 4, O., in the case of a town separated from a county, and in the case of a city where the high school is situated in the city or town, the councils of the county and of the city or town may agree on the terms of union by which the high school shall be the high school of the county as well as of the town.

The R. S. O. ch. 205, sec. 30, amended by 42 Vic. ch. 34, sec. 32, is the enactment bearing more particularly on the motion. It was passed on the 11th of March, 1879, and the two by-laws, 283 and 295, were passed under it.

It enacts that “in cases where two or more such minor municipalities, or portions thereof, within the same county hereafter agree to form and constitute themselves into a high school district, then such other sums as may be required for the maintenance of the said high school * * * shall be provided by such high school district upon the application of the high school board, and such sums shall be raised in the manner provided in the next following section of this Act, but nothing in this section shall be construed to affect any existing suit or to prevent the County Council from discontinuing any high school district heretofore formed by it, and any by-law of the council of a minor municipality for uniting any portion of it to another

municipality within the same county for high school purposes shall be deemed the agreement of such portion, and shall be passed by such council if petitioned for by two-thirds in number of all the taxpayers of such portion."

The power to make by-laws includes the power to alter or revoke the same and make others : R. S. O., ch. 1, sec. 8, sub-sec. 35. By the Municipal Act, however, by-laws creating debts, and provisions for their payment, cannot be repealed : R. S. O. ch. 174, sec. 336 ; 46 Vic., ch. 18, sec. 349, O.

The rule of law is, that the same body which passes a by-law may repeal it: *Newling v. Francis*, 3 T. R. at p. 198, per Ashurst, J. ; *Rex v. Ashwell*, 12 East, at p. 29, per Lord Ellenborough, C. J., and p. 32, per Bayley, J.

If the by-law is valid, and the body which made it will not repeal it, it can be repealed only by Act of Parliament : Roll. Abr. 363.

The repeal of a by-law can operate only prospectively, and cannot disturb rights which have been acquired under it.

In the case of *The Great Western R. W. Co. and The Township of North Cayuga*, 23 C. P. 28, the township passed a by-law under the authority of a special Act to rate the said property of the company in the townships at the value of \$12 per acre, (the then average rate,) for 50 years. The township in a year after the passing of that by-law repealed it. Held, that as it did not appear the company had done anything on the faith of the by-law which otherwise they would not have done, and had in no way altered their position by reason of the by-law, the council had the power to repeal it. I do not say anything against the authority of that decision further than this, that the subject decided may perhaps require further consideration.

The statutes shew the formation of a high school district, as in the case between the village of Grimsby and the two respective portions of the township of Grimsby, can be made only by voluntary arrangement or agreement

between the several bodies, and such bodies can act only by and through the municipal council: R. S. O. ch. 174, sec. 8; and the council must act by by-law when not otherwise authorized or provided for: sec. 277. 42 Vic. ch. 34, sec. 32, requires a by-law to be passed for the purpose, which "shall be deemed the agreement of such portion," and which "shall be passed by such council if petitioned for by two-thirds in number of all the tax-payers of such portion."

The rule then seems to be that a by-law, by the common law, as well as by our statute law, may be repealed. The rule also is, the power of repeal must be exercised by the like authority which enacted the by-law.

The effect of the township by-law was, with the corresponding by-laws of the village, to form a special high school district, and under and by virtue of the statute and of the by-laws to constitute an agreement for that purpose.

Such an agreement I am of opinion cannot be rescinded by one of the municipal bodies. The rescission must be assented to by each of the contracting parties, and should be based upon the petitions of two-thirds in number of all the taxpayers of the respective localities. The by-law must be passed on the petition of two thirds of the ratepayers, and it would not be right if the council could of their own motion repeal the by-law, which they would be bound on the petition of the necessary number of ratepayers to reenact.

These by-laws were assumed to be repealed by the by-law 315, on the petition of a number considerably less than two-thirds of the ratepayers of the township.

I must determine that the township of Grimsby had not the power to repeal the by-laws 283 and 295 without the concurrence of the village of Grimsby, and that they had not the power to repeal the said by-laws without the consent of two-thirds of the ratepayers of the particular localities mentioned in the by-laws, and that by-law No. 315 must therefore be quashed with costs.

If one of the municipalities decline to pass a by-law for

the repeal of the by-laws which control the High School District, or if the requisite number of taxpayers will not assent to the repeal, the Legislature is the only authority which can give relief.

Order absolute, with costs.

[CHANCERY DIVISION.]

DOBELL ET AL. V. THE ONTARIO BANK ET AL.

Bank—Principal and agent—Ratification—Guarantee—Absence of corporate seal—R. S. O. ch. 121.

D., on the suggestion of R. and the Bank of O. that he should purchase certain lumber held by the bank as security for advances made to R. required a guarantee from the bank that the lumber should be satisfactorily culled, and any deficiency paid for by the bank. The directors of the bank thereupon resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. Their local agent, however, with the approbation of their head manager, without previously employing a culler to report, gave a guarantee in writing, but not under seal, "on behalf of the bank," that the lumber should be satisfactorily culled, previously to shipment.

Held, that the bank was liable on the guarantee for any deficiency resulting from unsatisfactory culling, for the plaintiffs were warranted in assuming that the agent giving it had the necessary authority, and no seal was required; and if the bank wished to repudiate it, they should repay the money paid to them by D. for the lumber.

Held, also, that the above guarantee did not come within the description of a guarantee for the act of a third party, for the bank were selling, under R. S. O. ch. 121, by virtue of being holders of a warehouse receipt for the lumber.

The bill of complaint in this action was filed by Richard R. Dobell, Thomas Beckett, and Charles Taylor, praying that an account might be taken of what was due from the defendants to them upon certain transactions between them, and that the defendants might be ordered to pay the same to them with interest, and the costs of suit, that all necessary accounts might be taken, and for general relief.

The facts of the case, and the arguments of counsel, appear from the judgment.

The case was heard at the sittings of the Court at Ottawa, on March 28th, 1882, before Proudfoot, J.

D. McCarthy, Q.C., and *W. D. Hogg*, for the plaintiffs.

S. H. Blake, Q.C., *W. H. Walker*, and *D. L. McLean*, for the defendants.

June 22, 1882. PROUDFOOT, J.—The defendants are the Ontario Bank and John Rochester. I gave judgment at the hearing against Rochester, but reserved judgment as to the liability of the Bank under the circumstances detailed below.

On May 3rd, 1877, the defendant Rochester, through his agents, sold to persons now represented by the plaintiffs, (I gave liberty to amend by adding any parties as plaintiffs, if necessary, to complete the representation of the original vendees), about 500 or 600 St. Petersburg standard hundred bright pine deals of 1986 feet inch board measure, per standard hundred. Afterwards, on May 21st, the quantity was increased to about 750 of such standards, all of which were to be delivered on board at Montreal, one cargo on or about June 1st, 1877, and the other cargo on or about June 20th, 1877. The prices were specified in the agreement, and were to be paid by the purchasers' acceptance of the seller's draft at 120 days sight (payable in London), on presentation of invoice and bills of lading.

During the year 1877 Rochester delivered 642 standards for which he received payment, leaving about 108 standards still to be delivered to complete the contract.

Rochester was then largely indebted to the Ontario Bank for advances made to him in carrying on his lumber business, and the Bank having pressed him for security on November, 20th, 1877, he gave possession to one Edward Rochester of certain deals, and Edward Rochester, at the request of the defendant John Rochester, gave to the Bank as part security for that indebtedness, under the Ontario Statute as to warehouse receipts, a warehouse re-

ceipt for 108 St. Petersburg Standards, to be delivered to the order of the Bank.

Rochester had informed the Bank of his contract with the plaintiffs, and that it had not been carried out to the extent of about the 108 standards held by the Bank under the warehouse receipt; and both defendants, being desirous of realizing upon the deals, offered to deliver them to the plaintiffs as a performance of the balance of the agreement.

The plaintiffs, being dissatisfied with the culling of the deals delivered by Rochester in the previous summer, objected to receive or to pay for those held under the warehouse receipt by the Bank, unless the culling should be satisfactory, and in accordance with the several requirements respecting the culling of deals intended for shipment to England; but the plaintiffs agreed to receive the said deals from the defendants, and accept them under the contract, provided the Bank would give them a guarantee that the deals should be satisfactorily culled, and also that any quantity short should be paid for in cash by the Bank, which the Bank, as the bill alleges, agreed to do.

The agent of the Bank at Ottawa, thereupon, on January 9th, 1878, gave to the plaintiffs an agreement or undertaking, in the following terms:—

“I hereby guarantee, on behalf of the Ontario Bank, that the deals held by Messrs. Dobell & Co., under warehouse receipt from J. Rochester, dated November, 1877, say 108 standards, shall be satisfactorily culled next spring previous to shipment; and that any question arising as to the same shall be settled in the manner usual in Quebec, viz., Messrs. Dobell & Co. for purchasers, and Messrs. Carbray & Routh for Mr. Rochester, to agree upon a sworn culler to act in the interests of both parties. It being distinctly understood that any loss by fire or tempest after the date of the receipt above referred to, shall be at the risk of the purchasers.”

This was not under the seal of the Bank.

Upon receiving this agreement the plaintiffs delivered to the Bank a bill of exchange for £1,274 15s. sterling which was duly honoured at maturity, and accepted as full payment of the 108 standards.

The culling, I held upon the evidence, was not satisfac-

tory, and that the deficiency amounted to £316 14s. 10d. sterling, or \$1,539.40.

The deficiency was arrived at in this way: The 108 standards were sent to Carbray & Routh, at Montreal, for delivery to the plaintiffs, and a portion, amounting to 60 standard hundreds, were placed on board a vessel of the plaintiffs by Carbray & Routh. The plaintiffs did not see them before they were placed on the vessel; but before the whole were loaded the plaintiffs objected to the culling of the 108 standards, and declined to accept them unless they were properly and satisfactorily culled in pursuance of the agreement and undertaking of the Bank. It was then arranged between the plaintiffs and Carbray & Routh, for the defendants, that in consequence of the 60 standards having been placed on the vessel they should be allowed to depart, and that the 48 standards remaining on the docks should be re-culled in accordance with the terms of the agreement and undertaking of the Bank, and that in case after such re-culling any alteration should appear in the description and quality of the 48 standards in regard to culling, the said 60 standards already shipped should be altered in the same proportion. Upon the re-culling of the 48 standards a deficiency amounting in value to £148 4s. 3d. sterling appeared, and the deficiency in the 60 standards shipped in the same proportion would be £168 10s. 7d. sterling, making in all the £316 14s. 10d. above mentioned.

When the plaintiffs required a guarantee from the bank as to the culling, Woodman, the local manager at Ottawa, communicated with the head office at Toronto. The manager in Toronto wrote to Woodman telling him the resolution of the board to get a culler to examine the lumber, and if it was found to be as represented by Rochester to give the guarantee. Woodman did not get a culler, but wrote to the head office January 5th, 1878, saying the culling was useless, that there was no culler in Ottawa, and Rochester's culler was good enough. On January 7th, 1878, the manager at the head office wrote to Woodman that if he himself were satisfied he might

give the guarantee, and he being satisfied, acting on that authority gave the agreement or guarantee in question.

The bank set up a number of defences: that the resolution of the directors authorized a guarantee after an examination by a culler: that the general manager had no authority to dispense with that examination; and that the guarantee was therefore not authorized by the board.

Banks are authorized to take warehouse receipts, and under these they may sell the property, and therefore may do whatever is necessary to effect a sale. No resolution of the board it seems was necessary. But at all events Woodman was the agent of the bank, and was dealing with the plaintiffs in that capacity, his acts were not disowned by the board after they came to their knowledge. The head office was informed of the guarantee having been given on January 9th, and on the January 19th the plaintiffs handed the bills of exchange to the manager at the head office in Toronto. I think that the plaintiffs were warranted in assuming that Woodman had the necessary authority, and they are not to be affected by any private instructions given to him of which they were not aware: *Morawetz* on Private Corporations, Rule VI. sec. 62, *et seq.*, and sec. 71.

The Bank also contended that they were not liable as the guarantee, as it is termed, was not under seal; and that being a guarantee for the act of a third party it was not such an ordinary transaction as would be valid without a seal.

I do not think this comes within the ordinary description of a guarantee for the act of a third party. The Bank held the property under the warehouse receipt, and were selling under their power, though in the shape of carrying out the agreement made with Rochester. The agreement is therefore that the property they are selling shall be of a certain quality, that it should be satisfactorily culled, and if any dispute arose it was to be settled not by Rochester, but by a culler in the interest of both parties. I think it was an ordinary transaction, necessary to effect a sale, and not

within the class of cases which in England, and in our Courts, are deemed to require the sanction of a seal. The American Courts have adopted a different rule, and hold that a seal is unnecessary in all cases where a private individual might contract without seal: *Morawetz* on Priv. Corp. s. 167. But a conclusive answer to the objection is that under this agreement, whatever it is called, the Bank received the money, and if they repudiate the authority of their agent, or deny the binding authority of the agreement for want of a seal, they ought to refund the money; or, as the whole is not asked, they must repay the deficiency caused by the deals not being satisfactorily culled: *Morawetz* Rule XII., sec. 100, *et seq.*, and sec. 105.

Another objection of the Bank was that the agreement only bound them to see that the lumber was satisfactorily culled, that this has been done, and that they entered into no agreement to pay the deficiency. I decided against this at the hearing, and I remain of the same opinion still. The agreement that the standards shall be satisfactorily culled, is an agreement that the plaintiffs should have the 108 standards of the kind they had contracted for, and if these are not furnished the Bank must place the plaintiffs in as good a situation as if they had got them, or, in other words, pay the deficiency on the culling.

The Bank also contended that Rochester had no power to make the arrangement, so as to bind them, that the 60 standards shipped should without culling be governed by the culling of the 48 standards. But the Bank recognized the actions of Rochester in shipping the lumber, and declined to pay because he made objections to the payment. It was a reasonable and proper arrangement to enter into, to save the expense of unloading and reloading, and Rochester's agents must have known the quality of the lumber shipped, that it was of the same general character as that still on the wharf. Rochester was in fact employed by the Bank to carry out the details of the arrangement they had made for the sale of the lumber. Rochester employed Carbray & Routh to attend to the shipping; and I think all that was

done by them was within the scope of their authority, and within the scope of the authority given by the Bank to Rochester.

I have no hesitation in saying that I think the Bank liable, and that judgment must be given against both defendants, with costs.

I suppose there will be no need of a reference to determine the amount; if there is, it will be to the Master at Ottawa.

[CHANCERY DIVISION.]

MCCAUSLAND V. MCCALLUM, ET AL.

Fixtures—Mortgagor and mortgagee—Chattels.

Certain counters were embraced in the contract for the carpenter's work of a drug store, and nailed to a scantling, which was placed in the wall of the store. The bottom or ledge of the counters was made fast to the floor of the store, and the end connected with the frame-work of the windows in such a way that the wainscoting at the bottom of the windows would be materially injured by taking them (the counters) out, and the floor of the building also would be considerably damaged. *Held*, that the counters were part of the freehold and included in a mortgage thereof, and not chattel property.

Holland v. Hodgson, L. R. 7 C. P. 328, and *Keefer v. Merrill*, 6 A. R. 121, approved of.

THIS was an action brought by John McCausland against C. McCallum, W. Bryce, W. B. Selby, and T. T. Mann, for the foreclosure of certain mortgages of real estate, and for an injunction to restrain the defendant Selby from interfering with certain property which the plaintiff claimed was part of his mortgage security.

By his statement of claim the plaintiff set up that he was the holder of certain mortgages on lands in the village of Aylmer, made by the defendant Mann, which mortgages included a certain drug store in the said village: that certain sums were due and unpaid on the said mortgages: that after the execution and delivery of these mortgages the defendant Mann assigned all his estate, real and personal, to the

defendants McCallum and Bryce, in trust for the benefit of his creditors, who afterwards sold and conveyed to the defendant Selby the stock in trade then remaining of the said Mann, and Selby then continued to carry on business in the drug store above mentioned: that shortly before the commencement of this suit Selby attempted to remove from the store the counters, shelving, and drawers, which the plaintiff claimed were fixtures belonging to the said buildings; and the plaintiff claimed payment of what was due on the two mortgages, or foreclosure, and also an injunction against Selby to restrain him from removing or interfering with the said counters, shelving, and drawers.

By his statement of defence the defendant Selby admitted the assignment by Mann to McCallum and Bryce for the benefit of his creditors, and this, he said, included the shelving, drawers, and counters, and other shop effects, which McCallum and Bryce conveyed to him, together with other stock-in-trade and effects so assigned to them: and by virtue of this he claimed to be entitled to such effects, and to remove the same from the building in question: and he denied that the said shelving, drawers, and counters were fixtures, or were included in the plaintiff's mortgages, but asserted that on the contrary they were chattels, and could be removed without doing any damage or injury to the building. He also alleged that the said shelving, drawers, and counters were always considered by Mann and by the plaintiff as part of the office furniture and stock-in-trade of the said Mann, and were always insured by him, and by McCallum and Bryce, his assignees, with and as part of his stock-in-trade and effects, and the same were never insured with or considered as part of the building, or as security for the said mortgages: and he asked that the interlocutory injunction which had been granted against him might be dissolved with costs of suit. He also raised other defences, which, however, it is not material to notice here.

The case was heard at London, on May 29, 1882, before Ferguson, J. The evidence produced sufficiently appears from the judgment.

J. Farley for the plaintiff. The property in question being of a fixed and permanent character, the *onus* is on the defendant to show that it is chattel property: *Ewell* on Fixtures, pp. 275, 293; *Tabor v. Robinson*, 36 Barb. N. Y., 483; *Fisher* on Mortgages, 3rd ed. p. 27; *D'Eyncourt v. Gregory*, L. R. 3 Eq. 382; *Strickland v. Parker*, 54 Maine, 263.

Maxwell D. Fraser, for the defendant Selby. If the property in question is chattel property, the assignment by the trustees passed it. I refer to *Keefer v. Merrill*, 6 A. R. 121; *Dickson v. Hunter*, 29 Gr. 73.

September 9, 1882. FERGUSON, J.—The plaintiff is assignee of a mortgage upon the freehold.

The defendant claims title to the property in question as the assignee of chattels from certain trustees.

The mortgage under which the plaintiff claimed title, simply described the land by metes and bounds, and the property claimed by the defendant to be chattel property was in the building erected upon the land mortgaged.

The single question argued, and the only one material, I apprehend, is, as to whether or not the property is chattel property, or is so affixed to the premises as to be part of the freehold.

The building is a brick drug store, in the village of Aylmer.

The mortgage is for a large sum, and the property is said to be a scanty security for the amount.

The property in question is certain shelving, counters, &c., in the store.

A number of witnesses who had examined the property were called. They did not all entirely agree as to the details, or as to the amount of damages the building would necessarily sustain by the removal of the property in dispute, or as to the amount that would be necessary to replace it, if it were removed from the building, but it was not disputed that it was made fast to the building. The witness who apparently had the best and most

accurate knowledge of the matter was Samuel Smith, the builder who did the carpenter's and joiner's work of the building, and his evidence was not materially contradicted by the others. He seemed a very candid witness. He says :

"I did the joiner's work in this store. I had the superintendence of the joiner's work. I built the shelving and counters. They were embraced in the contract I had. I got \$600 for doing the carpenter's work, Mann (the then owner) finding the lumber. It was built in the year 1874. The same counters and shelves are there yet. I drew the plan for the store, and had a scantling placed in the wall to nail the top of the shelving to, and it was nailed fast to it. This scantling is called a band timber. The bottom of the shelving, the ledge, is made fast to the floor of the store. The plan of the store was specially for a drug store and a stationery store. The counters were constructed in the store as part of the store. The frame work was built on the floor and nailed to it. Movable counters are different. They are made outside and carried in and then tacked here and there to the floor. The frame work of these counters is made fast to the floor, and at the end connected to the frame work at the windows. The difference between this side and the other side of the store, which is used for the stationery, is simply this : that on the other side—used for the stationery—there is a row of long drawers under the ledge. The shelving rests upon a platform, composed of short pieces of scantling nailed fast to the floor, with a facing board and cover on which the standards are set and nailed fast. The standards are nailed to a band timber in the wall. Below the ledge there are cases of drawers that can be taken out by tearing off the facings on the standards. This is a protection in case of fire. The parallelogram cases hold drawers that go in and out. The shelves above the ledge are made fast by being nailed to the standards. Counters that are movable are made pretty much in the same way, and carried in and tacked down by a few nails. * * * The work at the window and the show case in the window would be materially injured by tearing out the counters and shelves. Some of the wainscoting at the bottom of the window would necessarily be damaged by taking out the counters and shelves. The building of the counters and shelves was a part of the architectural design of the building. If they were removed the damage to the building would be \$25 or \$30 ; with the loss of the counters and shelves, the loss would be \$500 or \$600."

In cross-examination he says :

"Even if the work of removing the counters were carefully done the floor would be damaged considerably. There are four counters, all nearly of the same construction. The shelving and counters were all put in new into the building. None of them were carried there and put in. They were all made with and for the building."

The other evidence given was not in my opinion

sufficient to throw any cloud upon the truthfulness or reasonable accuracy of this witness, and certainly he knew more of the actual facts than any of the others.

An effort was made to prove that the owner had at one time insured the property in dispute separately from the building, and as chattel property. This was not shewn by proper evidence, but even if it had been proved I do not think it could make any difference, for, such an act might be attributable to a desire to comply with some requirements of the insurance company. It would not, in my opinion, manifest a change of intention, if the original intention were that the property should become and be a part of the freehold. Counsel agreed that no question should be raised as to the drawers that were loose and could be moved in and out for use, and that it was not desirable that these should be considered as separate from the shelving in the body of which they were.

The late cases upon the subject involved here have been well collected, and the principles that govern carefully stated, in the cases *Holland v. Hodgson*, L. R. 7 C. P. 328, in 1872, and *Keefer v. Merrill*, 6 A. R. 121, referred to in a subsequent case: *Dickson v. Hunter*, 29 Gr. 73. Guided by these authorities and the cases cited in them, I am of the opinion that the property in question is part of the freehold and not chattel property. I do not consider it necessary to review the multitude of cases upon the subject of fixtures which have been so often and so recently reviewed by able Judges. I find no difficulty in arriving at the conclusion I have expressed upon the rules and principles stated in these cases.

There must be judgment for the plaintiff, with costs.

[CHANCERY DIVISION.]

McDONALD V. OLIVER ET AL.

Contract—Construction—Condition precedent—Obtaining estimate of engineer.

O. D. & Co. contracted with the Government to complete certain telegraph works, and M. afterwards contracted with O. D. & Co. to construct part of the said works, in which latter contract O. D. & Co. covenanted to pay M. at the rate mentioned therein per mile, but the contract was expressed to be subject to the condition that the said payments should be made to M. within twenty days after the estimate of the engineer in charge, to be by him put in from time to time to the Minister of Public Works, and service of a copy of such estimate on O. D. & Co.

Held, that this alone, apart from other portions of the contract, was sufficient to make such estimate and service of a copy thereof, a condition precedent to M.'s right to recover for work done under his contract.

Furthermore, by a third contract T. M. and G. M. contracted with both M. and O. D. & Co. to make advances to M., and to become security for M.'s due completion of the work, it being agreed therein that "upon the completion of the contract O. D. & Co. should pay T. M. and G. M. the amount due them by M. for supplies, before paying M. anything.

Held, that there must be an amount owing by O. D. & Co. to M., for which M. could recover against them, before O. D. & Co. were liable under the above contract to pay T. M. and G. M. anything, and that the intention was only to enable T. M. and G. M. to intercept payment by O. D. & Co. to M. of money due from them to M.

IN this case the plaintiff, Alexander McDonald, filed his bill against the defendants, Adam Oliver, Joseph Davidson, Peter J. Brown, Thomas Marks, and George T. Marks, under the following circumstances :

By agreement, dated February 9th, 1875, the defendants, Oliver, Davidson, and Brown entered into a certain contract with Her Majesty the Queen, represented by the Minister of Public Works for the Dominion of Canada, for the construction of certain works in connection with the Canada Pacific Telegraph Line, as therein set out; and by agreement dated August 2nd, 1875, the plaintiff entered into a sub-contract, to execute certain parts of the said works as therein set out; and on June 9th, 1877, by agreement entered into by the defendants Oliver, Davidson, and Brown of the first part, the plaintiffs of the second part, and the defendants Thomas Marks and George Marks

of the third part, the last named defendants agreed to make advances to the plaintiff, and to become security for the completion and due performance, by the plaintiff, of the said work, on the terms and conditions set out in the said agreement.

The terms of these agreements are sufficiently set out in the judgment.

The plaintiff cleared the land to the length required by the Government, and he distributed the poles along the ground, as named in the contract, as he alleged. The plaintiff, also, did certain clearing, under the orders of the Government engineer in charge of the works, over which, owing to changes made by the Government in the route or location of the line, the wires had not been erected, and which last named clearing had not been used for the purpose of the line of the telegraph by the Government. The Government engineer, however, had not, up to the date of the Master's certificate, hereinafter mentioned, given to the defendants Oliver, Davidson, and Brown, certificates for the clearing done by the plaintiff, along which the line of wire was not erected, and the Government had not, up to that time, paid Oliver, Davidson, and Brown for the same. The defendants Marks, moreover, made certain advances under their contract.

By his bill of complaint herein, the plaintiff set up the above agreements, and alleged that he had completed the work to be done by him, under the said contract with the defendants Oliver, Davidson, and Brown, and was entitled to be paid the balance due him in respect of the said work, which he alleged was a large one, though he was not able to state the amount thereof, as he was not aware of all the payments made by the said defendants to the defendants Thomas Marks and George T. Marks; and he alleged that he had applied to the defendants Oliver, Davidson, and Brown for a settlement of the accounts between them in respect of the said work, but the latter refused to have such settlement; and he prayed that an account might be taken of the moneys payable by the defendants Oliver,

Davidson, and Brown in respect of the said work, and that the balance due him from them might be ascertained by the Court; that the said defendants Oliver, Davidson, and Brown, might be ordered to pay the defendants Thomas Brown and George T. Marks, the balance due by the plaintiff to the said last named defendants, for supplies furnished by the said last named defendants, and for moneys paid by them on account of the plaintiff; that after such payment, the defendants Oliver, Davidson, and Brown might be ordered to pay him the balance found due from them by the Court; and for costs, and further relief.

All the defendants having put in their answers, and issue being joined, the cause was heard at Toronto, on April 20th, 1882, when the Court ordered that the cause should be referred to the Master, to take an account of all dealings between the plaintiff and the defendants Oliver, Davidson, and Brown, in respect of the work done by the plaintiff for the said defendants, in connection with clearing for and construction of the Canada Pacific Telegraph Line, as aforesaid, and to certify the balance (if any) due in respect of such works, and also an account of all dealings between the plaintiff and the defendants under the agreement, dated June 9th, 1877, and to certify the balance (if any) due to the said defendants Thomas Marks and George T. Marks in respect of advances made and supplies furnished by them under the said agreements. And the Court further ordered, that on taking the said accounts the Master should enquire and state whether the plaintiff had properly completed his contract with the said defendants Oliver, Davidson, and Brown, and what damages (if any) the plaintiff was liable to pay the said defendants Oliver, Davidson, and Brown in respect of such non-completion (if any). And the Court reserved the question of further directions and the costs of this suit until after the Master had made his report, and also the question of liability of the defendants Oliver, Davidson, and Brown, to pay to the plaintiff, or to the defendants Thomas Marks and George T. Marks, the amount which might be due for

work not estimated for to the said defendants Oliver, Davidson, and Brown, by the Government engineer.

On June 23rd, 1882, the Master, at the request of the solicitors for all parties, gave a certificate, whereby he certified that in proceedings under the above judgment, it had been made to appear before him that the only or chief matter in dispute between the parties arose with respect to the amount due from the defendants, Oliver, Davidson, and Brown, to the plaintiff, or to the defendants Thomas Marks and George T. Marks, for work not estimated for to the said defendants, Oliver, Davidson, and Brown, by the Government engineer, the question of the liability of the said Oliver, Davidson, and Brown to pay for which to the plaintiff, or the defendants Marks, had by the said judgment, been reserved until the hearing on further directions; and that it would in his opinion be a great saving of expense, if the said question of liabilities were determined by the Court, before any proceedings were had or evidence gone into for taking an account of the amount. He then set out a statement of the facts similar to the one given above, which had been agreed upon between the parties. He then stated that the questions arising on taking the accounts between the plaintiff and the defendants, Oliver, Davidson, and Brown, were chiefly in reference to the amount due (if any) in respect of the said work done by the plaintiff, under orders of the said engineer, and for loss of time while work was delayed by said engineer, for which he had not as yet given his certificate, and he set out the various amounts claimed by the several parties, as due to or paid by them, and, in the 9th paragraph of his certificate, he concluded as follows:

“The plaintiff contends that he is entitled to be paid for the whole of the clearing done by him under the orders of the engineer, without any reference to the question whether or not wires were erected upon the line so cleared by him, or whether the line so cleared was used for the purpose of the said telegraph, and also that he is entitled to receive payment for his work in full, upon the comple-

tion of his contract. And the defendants, Oliver, Davidson, and Brown contend that they can only be called upon to pay the plaintiff for the length of line along which the wires were erected, unless they are allowed for the same by the Government; and even if they are liable to pay for all the clearing done by the plaintiff under the orders of the engineer, still they cannot be called upon to pay the plaintiff for the said work until they have received a certificate for the same from the Government engineer as an estimate thereof from the Government. And the defendants Marks contend that they were entitled to be paid for their advances as soon as the plaintiff had completed his work."

The matter came up on September 21st, 1882, before Ferguson, J., at Toronto.

J. Bethune, Q. C., for the defendants Oliver, Davidson, and Brown. The agreement of June 9th, 1877, does not change anything in regard to the conditions precedent. Its sole object is to provide for an advance of money. Every payment under the contract sued on depends upon the certificate therein mentioned. The question is one of conditions precedent only; there are two conditions precedent, one, getting the certificate, the other, getting the money from the Government.

J. R. Roaf, for the plaintiff. All the contracts must be taken into account. The defendants' contract is more extensive in kind than the plaintiff's contract. The plaintiff was to be paid for every mile cleared under the direction of the engineer. The one contract provides for payment by the mile of telegraph line, the other by the mile of clearing. The part of clause 5 that is so broad is in effect limited to that part over which the defendants have no control. The plaintiff was not bound to the full extent to which the defendants were bound.

September 26, 1882. FERGUSON, J.—This is a question submitted by the Master (as referee) under the provisions of Marginal Rule 280 of the Judicature Act. The certi-

ificate of the Master, in which the question appears, bears date the 23rd June inst. The difficulty raised is in respect to the construction to be placed upon these contracts. One between the defendants Oliver, Davidson & Co. and Her Majesty, represented by the Minister of Public Works of the Dominion of Canada, bearing date the 9th February, 1875. Another, between the plaintiff and these defendants Oliver, Davidson & Co., bearing date the 2nd August, 1875. And the third, between these defendants, the plaintiff and the defendants Marks & Brother, bearing date the 9th June, 1877.

The firstly mentioned contract is for the performance of certain work, clearing the ground as for cropping, and erecting one wire line of telegraph along section number five of the Canadian Pacific Railway, four hundred and twenty miles, more or less, in length, on such route as the Government engineers should point out, and maintaining the line in good order for five years after completion. The manner in which the defendants Oliver, Davidson & Co., were to be paid is thus stated in the contract: "That payments of the price hereinbefore mentioned shall be made to the parties of the first part within ten days after an estimate of the engineers or officer in charge shall have been received by the Minister, specifying the amount of work done to the satisfaction of the said Minister, or his successors in office, or his engineer or person in charge of the works during the month then ended." Then follows a provision as to the retention of ten per centum of the money by the Government, and the optional relinquishment of such ten per centum by periodical payments, and the payment of interest upon it while retained.

The secondly mentioned contract is expressed to be for the sub-letting by the defendants Oliver, Davidson & Co. to the plaintiff, of "a portion of the firstly mentioned contract." And by it the plaintiff agrees to perform the part of the work to be performed by him in every respect to the satisfaction of the Minister of Public Works, and in accordance with the contract firstly mentioned; and the

contract with the plaintiff (the one secondly mentioned) states that the ground to be cleared by him shall be cleared on such *route* as the Government engineer in charge shall point out; and the defendants Oliver, Davidson & Co. in this contract covenant (subject to the conditions thereafter set out) with the plaintiff, that they will pay him for the whole of the work contemplated to be done and performed by him, at the rate mentioned per mile, "for every mile so to be cleared as aforesaid," including the delivery of the poles. The parties then declare that the contract is entered into upon express conditions that follow: The first of these conditions states that the payments shall be made to the plaintiff within twenty days after the estimate of the engineer or officer in charge, on behalf of the Minister of Public Works, to be from time to time put in by him to the Minister, specifying the amount of work done to the satisfaction of the Minister, &c., during the month then ended and past, and a copy of such certificate served upon the defendants, with a provision for the defendants retaining ten per centum, &c., until completion by the plaintiff.

The fifth of these conditions contains a provision respecting the stopping of the work or not as may be seen best in the event of Parliament not voting the necessary amount, or the amount voted therefor being at any time expended previous to the completion of the work, &c., and notice being given to this effect, and that the plaintiff should not be entitled to any further payment for work done after such notice until the necessary funds should be voted by Parliament, nor to any compensation or damages for suspension of payments: and then follow the words: "It being a condition precedent to the necessary payment by the said parties of the second part (the defendants Oliver, Davidson, & Co.) to the party of the first part (the plaintiff) for work done, that the parties of the second part (Oliver, Davidson & Co.) shall be placed in funds by the Government of the Dominion for payment of such part of the work as is required to be paid for by the said party of

the first part (the plaintiff) before it can be exacted from said parties of the second part."

The facts are clearly stated in the Master's certificate, and, the 9th paragraph states the contentions of the parties.

The chief contention before me was, as to whether or not the condition precedent mentioned in the fifth condition of the contract between the plaintiff and defendants Oliver, Davidson & Co., has reference to all work to be performed by the plaintiff under the contract, or has reference only to work that might be done by the plaintiff after the notice and under the circumstances mentioned in the preceding part of the same condition. The contention, however, extended to the whole question as to whether or not the plaintiff is under the terms of his contract entitled to be paid for clearing and work done by him under the orders of the engineer, in places where the telegraph line has not been erected, and in respect of which clearing and work the defendants Oliver, Davidson & Co., have received no certificate from the engineer or estimate from the Government—in respect of which, in fact, no certificate has been given at all by the engineer, or officer or person in charge.

I am of the opinion that the condition precedent stated in the fifth condition of the contract between the plaintiff and the defendants Oliver, Davidson & Co., applies to the whole of the work under the contract; but whether this is so or not, I think that the plaintiff cannot recover for any of the work under his contract without complying with the provisions of what is called the first of the conditions or stipulations to which the parties expressly declare the contract to be subject, which says that "payment of the prices hereinbefore mentioned for the construction of said works at the rate aforesaid upon the basis of this contract, shall be made to the plaintiff within twenty days after the estimate of the engineer, &c., and a copy thereof served upon the defendants Oliver, Davidson & Co." I think it clear beyond any reasonable doubt that the obtaining of the estimate of the engineer or officer, and service of a copy of it on these defendants, is made a condition pre-

cedent to be plaintiff's right to recover for work done under the contract. I think the contract cannot be otherwise read. Even the covenant of these defendants to pay for every mile so to be cleared as aforesaid, including the delivery of the poles, is expressed to be "subject to the conditions hereinafter set out;" and that payment shall be made in the manner that I have referred to, is one of these conditions. Even if this were not so, the provision that the payments to the plaintiff were to be made after the estimates specifying the amount of work done to the satisfaction of the Minister of Public Works, would itself be sufficient to make the obtaining of such estimates a condition precedent to the plaintiff's right to recover on the contract or in any form of action. The decisions on the subject are numerous since the decision of *Scott v. Avery*, 5 H. L. C. 811. The principle, although in a different kind of case, is stated both by Kelly, C. B., and Pigott, B., in *Dawson v. Fitzgerald*, L. R. 9 Ex. p. 7. See the judgment of Wilson, C. J., in *Ekins v. County of Bruce*, 30 U. C. R., at p. 50. True, there were negative words there, as well as in *Scott v. Avery*, but, according to Kelly, C. B., in *Dawson v. Fitzgerald*, negative words are not necessary where the implication is clear. See also *Ferguson v. Corporation of Galt*, 23 C. P., 66, and cases there cited on the subject. Many other cases might be referred to, but I do not consider it necessary.

I do not think the contention of the defendants Marks Brothers can be sustained upon the agreement made with them. The clause they rely upon is, no doubt, the latter part of the paragraph, in these words:

"And it is further agreed by the first and second parties" (the plaintiff and the defendants Oliver, Davidson & Co.,) "that the moneys due the second party (the plaintiff) for works on the aforesaid contract shall be paid over by the first parties" (Oliver, Davidson & Co.) "to the third parties" (Marks Brothers) "as soon and as often as the monthly estimates are received from the engineers, and that upon the completion of the contract the first parties (Oliver, Davidson & Co.) shall pay over to the third parties (Marks Brothers) the amount due them by the second party (the plaintiff) for supplies, before paying the said second party anything."

I, however, think it clear enough that there must be an amount owing by Oliver, Davidson & Co. to the plaintiff, for which he could recover, before they could be liable to pay anything to Marks Brothers, and that the intention was only that Marks Brothers should intercept payment by Oliver, Davidson & Co. to the plaintiff, and this could only be done when an amount was owing the plaintiff for which he could recover.

I am, therefore, of the opinion that the plaintiff cannot recover for work in respect of which there are no certificates or estimates of the engineer or officer in charge, and that Marks Brothers have no higher right against Oliver, Davidson & Co., than the plaintiff has. They have only the right to intercept payment to the plaintiff of moneys that he could call upon Oliver, Davidson & Co., to pay him.

The costs are, I suppose, part of the costs of the reference, but if not, counsel for Oliver, Davidson & Co., may apply as to costs.

[CHANCERY DIVISION.]

SWAISLAND V. DAVIDSON ET AL.

Promissory notes—Restricted negotiability—Mutilation—Negligence—Innocent holders.

D. gave C. two promissory notes, payable to C. or bearer, but having indorsed on them contemporaneously with their making, and in the case of one of them on the edge of the paper, the words "the within notes not to be sold," which indorsement the evidence shewed formed part of the contract between the parties. The notes were transferred to S., with the word "not" in the above indorsement, in the case of one of them, erased, and the whole of the said indorsement, in the case of the other, in which it was written along the edge, torn off, but without destroying any part of the face of the note.

Held, that whether the words of the above indorsement were underwritten or indorsed was immaterial, they being part of the original contract, and the effect of it was to prevent C. disposing of the notes to a holder for value, so as to preserve to the makers all defences and equities, as against the first holder and volunteers under him, thus qualifying their negotiability.

Held, also, the notes having been altered in a material part, D. was discharged, and S. could not be protected on the ground of any negligence on D.'s part in respect to the note in which the indorsement was written along the edge of the paper, inasmuch as the notes were issued in a perfected shape, and the doctrine of negligence does not apply to such perfected instruments.

It appeared that S. was a private banker: that he had been informed before taking the notes that they were given in purchase of patent rights: that he noticed the erasure in the one of them first purchased, and that he paid much less than the commercial value of them, while they both bore marks of infirmity, and indeed of knavery.

Held, S. could not be considered an innocent holder of the notes.

The bill of complaint in this suit was filed by Wilmot Swaisland, on behalf of himself and others the creditors of the defendant Thomas Davidson the elder, against Thomas Davidson the elder, Ann Davidson, his wife, John Joseph Davidson, Thomas Davidson the younger, and Margaret A. H. Davidson, seeking to have certain conveyances declared fraudulent and void, as against himself and other the creditors of Thomas Davidson the elder, and for payment of his and their debts.

In the first paragraph of his bill, the plaintiff alleged that the defendant Thomas Davidson the elder was justly and truly indebted to him in the sum of \$300, on two promissory notes of \$150 each, now overdue, both dated

November 5th, 1878, and both made by the said defendant payable to one Alexander Cameron or bearer, seven months and fourteen months after the date thereof, respectively, with interest, and which the said Alexander Cameron assigned and transferred to the plaintiff, who was the lawful bearer thereof; and also for money payable by the said defendant to the said Cameron, for goods bargained and sold by Cameron to him, and for goods sold and delivered by Cameron to him, and for the license and permission of the said Cameron, by him granted to the said defendant, at his request, to use, make, and sell a certain implement, to the use, making, and selling of which, the said Cameron and his assigns had, under letters patents of invention, the exclusive right, and of which patent the said Cameron was then the owner; and for interest upon money due from the said defendant to the said Cameron, and forborne interest by the said Cameron to the said defendant at his request, of which causes of action the plaintiff was the assignee and entitled to sue for and recover upon in this Court. The plaintiff then stated that there had been certain conveyances of lands belonging to the defendant, Thomas Davidson, in which the said defendant and his wife were grantors and the other defendants grantees; but that these conveyances were made for pretended considerations only, and rent charges were reserved therein to the defendant Thomas Davidson the elder, and to his wife, which conveyances, the plaintiff alleged, were simply voluntary and void as against him, and were made and executed for the purpose of defeating and delaying the creditors of Thomas Davidson the elder. He alleged that at the time of making them the defendant Davidson had no other property, nor had he since acquired any property out of which his debts could be satisfied; and he prayed that the said conveyances might be declared fraudulent and void as against him and the other creditors of Thomas Davidson the elder, and might be set aside, or that an account might be taken of what had become payable to Thomas Davidson

the elder, under the charges in his favour therein contained, since the filing of the bill, and for an order for the payment of the amount thereof to the plaintiff, to satisfy his claim and the costs of this suit, and that the rights and interests of the said defendant in the said lands under the said conveyances might be sold, and the proceeds applied to satisfaction of the plaintiff's claim and costs of suit; that he might be paid the said \$300 and interest, or in default that the said lands and premises, or the rights of Thomas Davidson the elder therein, be sold to satisfy the plaintiff and the other creditors; and for costs, all proper directions, and general relief.

By his answer Thomas Davidson, the elder, denied that he was indebted to the plaintiff in any sum whatever. He said that the two promissory notes above mentioned were obtained from him by the fraud of Alexander Cameron, and without consideration, and that the plaintiff, when he became the holder of them, had notice of such fraud and want of consideration; that after the said notes were made and delivered, they were made void by being materially altered without his knowledge or consent, by inserting in the body of the said notes the words "or bearer," so as to render the same negotiable, also by inserting therein a place for payment, and also by tearing off or erasing a certain memorandum endorsed on each of the said notes in the following words: "This within note not to be sold," such memorandum being a condition restricting negotiability of such notes, and being a material part of the contract contained in and evidenced by such notes; and he declared that the conveyances of land, impeached by the plaintiff were made *bonâ fide* and for valuable considerations, and were not fraudulent as alleged by the plaintiff.

The other defendants, also, severally put in answers to the effect that the said conveyances were made *bonâ fide* and for value, and were not fraudulent as alleged by the plaintiff.

The evidence produced and the other facts of the case sufficiently appear from the judgment.

The case was heard at London on September 28th, 1882, before Boyd, C.

Meredith, Q. C., for the plaintiff. The endorsement cannot alter the legal effect of the face of the note: *Brill v. Crick*, 1 M. & W. 232. The legal effect of what was done was to make a negotiable note with a collateral agreement that it should not be parted with. The defendant, Thomas Davidson the elder, having permitted the endorsement in the case of one of the notes to be made in such a way that it could be torn off must suffer: *Daniell* on Negotiable Instruments, 2nd ed. sect., 1407; *Leeds v. Lancashire*, 2 Camp. 205; *Stons v. Metcalfe*, 4 Camp. 217; *Hartley v. Wilkinson*, 4 Camp. 127; *S. C.*, in appeal, 4 M. & S. 25. As to the conveyances, they cannot stand: *Merchants' Bank of Canada v. Clarke*, 18 Gr. 594.

Rock, Q. C., for the defendant Thomas Davidson the elder. All parties understood that the notes were not to be negotiable.

Macbeth, for the other defendants, referred to *Suffell v. Bank of England*, 30 W. R. 932.

October 11, 1882. BOYD, C.—The plaintiff's whole cause of action depends on the validity of the two notes sued upon. I am of opinion he is not entitled to recover upon either instrument. The evidence leaves no doubt upon my mind that the words, "This within note not to be sold," were endorsed upon both notes contemporaneously with their making, and that the face and the back of both the notes must be read together as forming the contract between the parties. Whether the memorandum qualifying the effect of the note is underwritten or endorsed, is immaterial, so long as it was a part of the original contract: *Warrington v. Early*, 2 E. & B. 763; *Hartley v. Wilkinson*, 4 M. & S. 25; *Campbell v. McKinnon*, 18 U. C. R. 612.

The next question is, as to the materiality of the endorsement. That appears sufficiently, I think, from a

reference to the circumstances and the frame of the notes. The notes were for a patent right, as to which the defendant desired a period of trial, and during their currency he stipulated that they should not be disposed of. This was intended to be carried out by the words endorsed, though on the face the notes were payable to Alexander Cameron or bearer. The effect of the endorsement is to provide against Cameron disposing of the notes to a holder for value, so as to preserve to the maker all defences and equities as against the first holder and volunteers under him. The endorsement thus qualifies the negotiability of the notes; and as affecting their commercial character, forms a material part of each of them.

It is said that the notes came to the hands of the plaintiff as a purchaser for value, (though at a great reduction from the amount of the notes) before they were due; that when one was bought by him, the word "not" had been erased from the words endorsed, so that it read, "this within note to be sold," and from the other, the words endorsed being at the end of the paper were torn off, and this without destroying any part of the face of the note. This erasure and this excision are each material alterations of the notes, destroying their value as securities, and discharging the defendant from liability thereupon.

The notes were issued in a perfected shape—no blanks being left to be filled subsequently, and I do not think the argument of negligence urged by Mr. Meredith can avail to protect the plaintiff. It is said that the defendant was negligent in allowing the endorsement to be put at the end of the paper, where it could be so easily torn off, and that being so he should suffer instead of the plaintiff.

I do not think the doctrine of negligence should apply to cases of perfect instruments like the present. The earlier decisions going in that direction like *Young v. Grote*, 4 Bing. 253, have not been regarded with favour in later times: *Baxendale v. Bennett*, L. R. 3 Q. B. D., 525. In *Burchfield v. Moore*, 3 E. & B. 683, the bill was after issue altered in a material part without the knowledge or con-

sent of the acceptor; and the plaintiff was a *bond fide* holder for value without notice of the alteration, but it was held that the bill must be considered as vitiated and the acceptor discharged, when the alteration was made, See also *Wait v. Pomeroy*, 20 Mich. 425, a case where a condition underwritten was cut off: *Holmes v. Trumper*, 22 Mich. 427, a particularly able judgment of Christiancy, J., and *The Greenfield Savings Bank v. Stowell*, 123 Mass. R. 196, where all the authorities are collected and reviewed; and *Halcrow v. Kelly*, 28 C. P. 551; *Suffell v. Bank of England*, 30 W. R. 932.

But I do not regard the plaintiff as an innocent holder of these notes. He is a private banker—an expert in dealing with negotiable paper; and he was informed before buying that these notes were given for patent rights. He pays much less than the commercial value of the securities, and is obliged to admit that he noticed the erasure of “not” in the note first purchased by him. He had this note when he bought the other. A comparison of the two discloses at once where the mutilation has taken place on the later one; the folds of the note, the cutting off close by the bill stamp, would excite the suspicion of a person of ordinary prudence. Both notes carry marks of infirmity, and indeed of knavery, upon their face. Persons dealing in such ventures take them at their own risk, and need not be surprised if the peril outweighs the profit.

The action is dismissed, with costs.

[CHANCERY DIVISION.]

RE O'BRIEN.

Foreign administration—Right of creditor and next of kin—Private international law—Removal of proceedings from the Surrogate Court to this Court—Peremptory writ—The Surrogate Court Act—R. S. O. ch. 46, secs. 32, 36.

One D. dying domiciled abroad, R., a creditor of her estate, obtained letters of administration there. Subsequently S., as appointee of R., and with his consent, applied here for letters of administration to be granted to him by the Surrogate Court. E., however, residing at Toronto, and as next of kin to B., also applied here for administration to B.'s estate. S. now applied to have the matter transferred into this Court, or for a writ of prohibition to the Surrogate Judge preventing him granting letters to E., and a mandamus ordering him to grant them to S.

Hell, failing any proof as to the law in Maine, it must be assumed to agree with the law here, according to which the Court will not grant administration to a creditor, so long as one having a better claim, as is the case with the next of kin, is willing to act; and, inasmuch as the next of kin did not appear to have been cited before the Court in Maine, the *status* of the creditor who obtained administration there, or of his appointee, was not such as to compel the Surrogate Judge here to pass over the next of kin.

The appointment of a creditor as administrator is not as of right, but rests in the discretion of the Judge who appoints, and that cannot be interfered with by any peremptory writ; and R. S. O. ch. 46, secs. 32, 36 do not better the claim of a creditor.

Browne v. Phillips, Ambl. 416, followed.

Re Hill, L. R. 2 P. & D. 89, distinguished.

THIS was an application for an order of removal of a certain cause or proceeding, pending in the Surrogate Court of the County of York, in the matter of the goods of one Bridget O'Brien, deceased, into this Division, or in the alternative for a writ of prohibition to the Judge of the said Surrogate Court, prohibiting him from issuing letters of administration of the estate of the said Bridget O'Brien, to one Elizabeth O'Brien, the contesting petitioner thereof, and for a writ of mandamus to the said Judge, requiring him to issue letters of administration as aforesaid to the applicant, as appointee of one E. M. Rand, under the following circumstances. The applicant was employed as solicitor of the said Bridget O'Brien in a certain suit in this Division, in which the said Bridget O'Brien had been

adjudged entitled to certain moneys deposited, at the time of this application, in this Court. Bridget O'Brien died in June, 1882, without leaving any will, and was, at the time of her death, domiciled at the City of Portland, in the State of Maine, U. S. A. Of the family of the said Bridget O'Brien the only members now surviving were the above mentioned Elizabeth O'Brien, a daughter residing at the time of this application in Toronto, a son who was said to reside in New Brunswick, and some children of a deceased daughter, supposed to be infants, and to reside at some place unknown in the United States. The above mentioned E. M. Rand, who resided at Portland, took out there letters of administration to Bridget O'Brien's estate, and an application was made to the Judge of the Surrogate Court of the County of York for ancillary letters of administration to the said E. M. Rand. Shortly after this application was filed, the said Elizabeth O'Brien filed an application for letters of administration in the same Surrogate Court, and on return of a notice to decide upon the conflicting applications, the learned Judge of the Surrogate Court, without then deciding the question, intimated that the said E. M. Rand would be required to furnish security to double the amount in Court, which was \$2,800, in case administration should be granted to him. The argument being adjourned, in the meanwhile an application was made by the present applicant to the said learned Judge asking for ancillary letters of administration, with the consent of the said E. M. Rand, to be issued to him, offering to file an authorization or power of attorney to him from the said Rand, and to furnish the necessary security.

Subsequently the said learned Judge intimated that he would grant letters of administration to the said Elizabeth O'Brien, on her furnishing security to double the amount of two thirds of the money in question, whereupon the present application was made.

In his affidavit filed in support of this application, the applicant, after stating the above facts, which were not

disputed, stated that the said E. M. Rand, the administrator of the domicil, claimed that he was entitled to distribute the money according to the law of the State of Maine after paying the debts here: that the solicitor of Elizabeth O'Brien contended that Rand had nothing to do with the money, and that this was also apparently the view of the said Judge of the Surrogate Court: that Elizabeth O'Brien ignored the claim of the said Rand to the money in question, and proposed, as the applicant believed, to treat administration to her, if granted here, as original administration: that there were disputed questions of law and fact in this case, and the difficulties in regard to it were such that the applicant believed justice could more effectually be done by having the matters tried and disposed of in this Court than in the Surrogate Court: and that Elizabeth O'Brien claimed all the money in question, under a will of her father, and that, though the applicant believed that the suit in this Court above referred to decided that she was not entitled to it, her solicitor claimed that the executors named in the said will were not debarred from bringing another suit in regard thereto, and that he had threatened to bring such action.

No affidavits were filed in reply.

It appeared that E. M. Rand was a creditor of the estate of Bridget O'Brien, and as such obtained letters of administration as above stated.

The application came up for argument on Tuesday, October 24th, 1882.

D. A. O'Sullivan, the applicant, in person, referred to *Re Eccles*, 1 Ch. Ch. 376; *The King v. Bettesworth*, 7 Mod. 219, 313; *Westlake*, 2nd ed., sec. 59; *In the Goods of E. S. Hill*, L. R. 2 P. & D. 89; *Wharton* on the Conflict of Laws, secs. 570, 608.

J. A. Donovan, contra, referred to *Story* on Conflict of Laws, sec. 513.

Howell's Surrogate Court Practice, p. 291, and *Story* on Conflict of Laws, 7th ed., sec. 512, were also cited.

October 25, 1882. BOYD, C.—Failing any information respecting the state of law in Maine as to grants of administration, I am to assume that it agrees with ours. In that case the Courts will not grant letters of administration to a creditor so long as any one having a better claim is willing to act. The next of kin are entitled as of right under the Statute of Hen. VIII., (a) and not being cited before the Maine Courts, the *status* of the creditor or of his appointee who obtained administration there, is not such as to compel the Surrogate Judge here to pass over the next of kin who is willing to take administration. The administration of personal property is governed by the law of the *situs*, although the right of succession is governed by the law of the domicile: *Dicey's Law of Domicil* 315. If there is no estate in Maine, that is an additional reason for the Judge exercising his discretion against the appointee of the foreign creditor. The appointment of a creditor as administrator is not as of right, but one resting in the discretion of the Judge who appoints. That was the reason given for refusing to interfere in a case analogous to the present, to be found noted in *Burn v. Cole*, Ambl. 416. A case of *Browne v. Phillips*, came on before the Privy Council in 1739. One died intestate in England; administration was granted in England to A., a creditor. The attorney of A. applied in Jamaica for administration, but it was refused. He appealed to the King in Council and was heard *ex parte*, but the sentence was affirmed, because as none of the next of kin applied, it was discretionary in the Judge to grant administration to a creditor. Where a will has been made and probate of that is granted to the executor in a foreign country, he, as the person entitled to the grant, should be appointed in any ancillary administration of property in another country. But this is not the rule applicable necessarily to cases of intestacy, where those entitled have been passed over by the Courts of the domicile. See *Williams's Law of Executors*, 8th ed., p. 375, 436 notes, and *Hervey v. Fitzpatrick*,

(a) 21 Hen. VIII. ch. 5.

Kay 421. The case of *In the Goods of E. S. Hill*, L. R. 2 P. & D. 89, which was cited to me, was one of testacy, and merely exemplifies an application of what is undoubtedly the general rule, that the grant of administration by the Courts of the domicile governs the discretion of the foreign Court in decreeing administration to the same person. This is, however, by no means the invariable rule even in cases of testacy. See cases referred to: *In the Goods of Earl*, L. R. 1 P. & D. 450, and *In the Goods of Cosnahan*, *Ib.*, 183.

Having regard to *In re Beckwith*, 5 U. C. L. J. 256, I do not think any such case of contest is established here as would justify my removing the matter of contention to this Court. Nor do I think the applicant has any right to a mandamus or prohibition. That remedy may be awarded to enforce the right of a sole next of kin: *The King v. Dr. Hay*, 1 W. Bl. 640.

The Surrogate Court Act, R. S. O. ch. 46, secs. 32, 36, and 54, do not better the claim of a creditor. Whether he shall or shall not be appointed, still rests in the Judge's discretion: *Hawke v. Wedderburne*, L. R. 1 P. & D. 594; and that cannot be interfered with by any peremptory writ: See *Williams's Law of Executors*, 8th ed. p. 446, and note.

The application is refused with costs, which may be taxed by the Registrar.

[CHANCERY DIVISION.]

IN RE WILLIAM A. HALL.

Extradition—Ashburton Treaty—Forgery.

The prisoner was a clerk in the office of the comptroller of the city of Newark, New Jersey, U. S. A., his duty being to make proper entries of moneys received for taxes in the official books of the comptroller provided for that purpose. Having received a sum of money for taxes, he entered the correct amount at first, and then erasing the true figures he inserted a less sum, with intent to benefit himself by the abstraction of the difference between the two, and to deceive the comptroller and the municipality.

Held, that the offence was forgery, and [that] the prisoner had been properly committed for extradition.

It is not necessary to constitute the crime of forgery that another's right shall have been actually prejudiced, the possibility of prejudice to another is sufficient; and if publication be necessary, the books in question being of a public character, the forged entry in them must be regarded as having been published as soon as made.

Semble, per PROUDFOOT, J.—It is not necessary for purposes of extradition that the crime charged should have been such an act as would have constituted that crime at the date of the Ashburton Treaty. It is sufficient if it constituted the crime in question at the date of its alleged commission.

THIS was a motion, made upon return of a writ of *habeas corpus* before the Divisional Court of the Chancery Division, to discharge the prisoner William A. Hall from custody under a warrant of commitment, dated June 28th, 1882, made by Kenneth Mackenzie, the Judge of the County Court of the county of York, for forgery of the cash book and account of the comptroller of the city of Newark, New Jersey, by altering an entry of \$562.32 received on March 18th, 1881, to the sum of \$362.32, to enable him to embezzle the difference, \$200. The prisoner was chief clerk in the comptroller's office, and had custody of moneys received, and charge of the cash-book, the entries in which were made by him. The prisoner had been brought before Osler, J., on *habeas corpus*, but remanded to custody by him on July 8th, 1882, and the facts of the case are fully set forth in the judgment of that learned Judge reported in 9 P. R. 373.

September 9, 1882. *J. Bethune*, Q.C., and *N. Murphy*, for the motion. The prisoner's offence was not forgery

within the Ashburton Treaty of 1842, (see 31 Vict. ch. 94, Can.) for that treaty applied only to such offences as were recognized as forgeries by the general law of both nations at that time. *Ex parte Charles Windsor*, 12 L. T. 307, S. C. 10 Cox C. C. 118, S. C. 6 B. & S. 522, shews it is not sufficient to shew that Hall was guilty under any local law of forgery. See too, *Ex parte Lamorin*, 10 L. C. Jur. 280; S. C. 2 C. L. J. 283, and 4 C. L. J. 486. The prisoner's act was merely to make false entries in a book kept by himself, showing his own receipts, and this was not forgery at common law in England, or therefore here. We refer also to *Re Saunders*, 59 L. T. 133 (editorial part). Such an offence is not forgery even now in England, but simply a misdemeanour under the Falsification of Accounts Act, 1875, Imp. 38-39 Vict. ch. 24. The Imperial Parliament there declares that down to the time of the said statute such an act was not an offence in England, but by that Act it is for the first time made an offence. Sec. 3 of that Act enacts that is to be read not as part of the Forgery Act, but as part of the Larceny Act, shewing an intent on the part of the Legislature that an act such as the prisoner is accused of is not to be treated as a forgery. The question is, what was the law in England in 1842 in this matter? Osler, J., does not dissent from this. The prisoner's offence may be forgery now according to the law of Canada under 32-33 Vict. c. 19, ss. 26, 45, but it was not forgery in 1842, and therefore not within the treaty. The decisions in the American Courts are not binding on us, but it is clear it would not be forgery in the United States: *State v. Young*, 46 N. H. 266. To be forgery it must be of some completed document, but the document was not complete. We also cite *Regina v. Smith*, 1 Leigh & Cave C. C. 168; *Regina v. French*, L. R. 1 C. C. R. 217; *Regina v. Close*, Dear. & B. 460; *Regina v. Griffiths*, Dears. & B. 548; 2 *Russell on Crimes*, 5th ed., p. 622.

F. Fenton, for the authorities of New Jersey, *contra*. The prisoner's offence is forgery by common law: *Regina*

v. *Ritson*, L. R. 1 C. C. R. 200, S. C. 11 Cox. 362, and the definitions of forgery in Blackstone, Russell, Archbold, Chitty, Stephens, and all text writers. *Biles v. The Commonwealth*, 32 Penn. 529, shews that the prisoner's offence would be held forgery in the United States under the common law. The forged entry was an accountable receipt within 7 Geo. II. ch. 26 (which is still embodied in our law 32-33 Vict. ch. 19, sec. 26), and the offence was therefore, forgery at the date of the treaty : *The King v. Harrison* 1 Leach. 180 ; *Regina v. Smith*, Leigh & Cave C. C. 168 ; *Regina v. William Moody*, Leigh & Cave C. C. 173. *Ex parte Windsor, supra*, and *Re Saunders, supra*, relied on by the prisoner's counsel, do not apply, for the reasons stated by Osler, J. The cash-book was not the prisoner's but the official public book of the comptroller, and the entry was not of cash received by the prisoner, but by the comptroller. Besides the *ratio decidendi* in *Windsor's Case* was that his offence was only forgery in New York State, where it was committed, and not forgery in England, where he was arrested. In the present case the offence is clearly forgery by the law of Canada : 32-33 Vict. ch. 19, secs. 26-45, as well as in New Jersey, where it was committed. The law relating to the offence at the time of its commission, and not at the date of the treaty, must govern. The recital in the treaty shews that the contracting parties did not contemplate the then existing laws in the various jurisdictions for which they were negotiating, but laid down the simple rule that whatever should thereafter be held to be crimes of the nature specified in the treaty by the local laws of the place where the offence was committed, and where the offender was found, should be followed by extradition ; and this violated no right of asylum in any territory of either party, for the local law of any territory could always decide what should or should not be an extraditable offence. The treaty operates *in futuro*, and *Windsor's Case* is not really against this contention.

[BOYD, C.—But the treaty does not say “What is now or

shall hereafter be made forgery ;" it was referring to some certain crime called forgery.]

[*Bethune, Q.C.*—*Clarke's Treatise on Extradition*, 1 Schd. App. p. xlvi. may be referred to as throwing light on the subject.]

In *Ex parte Windsor, supra*, it was only the demanding country which had constituted the act a crime, but here both countries have done so; therefore I say under the treaty the man should be surrendered. In *State v. Youug*, 46 N. H. 266, the merchant only put false entries in his own book; but here Hall erased true figures in his book, and substituted false ones; this distinguishes the case, and is forgery. Wherever a correct record is wilfully changed to make it a false record, that has always been held to be forgery.

[*Boyd, C.*—Can you name any case shewing that altering the figures makes it forgery, when it would not be forgery if the false figures were put down at first ?]

I cannot; but what I say is, that there is no case where altering a correct document into a false one has not been held to be forgery. As to the document not being a complete one, *Biles v. Commonwealth, supra*, clearly shews the alteration of anything is forgery. In *Re Regina v. Gould*, 20 C. P. 154, shews, moreover, that if the evidence is such that on any aspect there is sufficient to put a man on his trial, there should be a surrender. When a Legislature makes an act forgery they do it knowing that extradition is involved. The enactment cannot be held to apply to everything else, but not to extradition.

J. Bethune, Q. C., in reply. As to the question of the treaty, *Wheaton's International Law*, 2nd ed., by Boyd, p. 344, deals with the question. Manifestly the contracting powers only dealt with certain specified crimes. They did not know what various Colonies might afterwards declare to be forgery. Lord Ashburton meant forgery as well understood in England. Forgery was a definite quantity, and must mean the same in 1882 as in 1842. As to *In re Regina v. Gould*, 20 C. P. 154, the quantum of

evidence is a different question to that of the offence itself. This case turns on the nature of the offence. Besides this is in law an alteration made on the books of the city by the city itself and, therefore, doesn't come within any definition of forgery. It is not an accountable receipt, for it does not on its face show the money was not received from one person by another. It would shew nothing except by means of the interpretation by the other documents. The document is not complete on its face. Our statute does not apply for the reasons fully stated by Osler, J. The treaty, moreover, should be construed with strictness, and the prisoner should have the benefit of any doubt in favour of the right of asylum. I also cite *Regina v. Gooden*, 11 Cox C. C. 672.

November 11, 1882. BOYD, C.—The wrongful act attributed to the prisoner is, in my opinion, forgery at common law. He was clerk in the office of the comptroller of the city of Newark, whose duty it was to make proper entries of moneys received for taxes in the official books provided for that purpose. These books were not the prisoner's, nor did they represent his dealings, but those of the municipal officer whose assistant he was. Having received a sum of money for taxes he entered the correct amount at first, and then erasing the true figures he inserted a lesser sum, with intent to benefit himself by the abstraction of the difference between the two, and to mislead his superior officers and the municipality, to whom he was accountable. This state of facts presents two points of distinction when compared with those in the *Windsor Case*, 10 Cox C. C. 118, S. C. 6 B. & S. 522, which was relied on by the counsel for the prisoner. In that case the entry was one made in the private book of the wrongdoer, and it was from the first what it purported to be *i. e.*, an untrue entry. Here the books were of a quasi public character; the property of the comptroller or treasurer; and the entry originally true was made false by its subsequent alteration.

Blackstone's definition of forgery is perhaps the most

simple and comprehensive of the many to be found in the books. Using his language, it is "the fraudulent making or alteration of a writing to the prejudice of another's right," 4 Bl. Com. 247. Even this is perhaps rather broadly put in one respect, as according to *Rex v. Ward* 2 Ld. Raym 1461, the possibility of prejudice to another is sufficient at common law. According to Chitty's comments upon this decision, forgery at common law may be committed in respect of any writing whatever, by which another may be defrauded: Crim. L., vol iii. p. 1022. To the same effect: East, P. C. vol. ii. ch. 19 sec. 1, pp. 852, 860. Entries in books of account are such writings as may be the subject of forgery: *Regina v. Smiht*, 9 Cox 162.

In *Biles v. The Commonwealth*, 32 Penn. 529, there is a decision that precisely such an act as the prisoner's, amounts to forgery at common law. The confidential clerk of a mercantile firm having charge of the books, altered the addition of figures in the journal, so as to represent the cash received by him to be less than it really was, with a view to cheat his employers. Having received the money and having made the correct entry in the book, he had discharged his duty towards his employers by exhibiting there the amount for which he became liable to account. The principals from that moment had an interest in the entry, and could claim the benefit of it against their employee. When the false and fraudulent alteration was made for the private gain of the clerk he was acting in a different although ostensibly the same character, and was thereby falsifying a true record of the transaction to the manifest prejudice of his employers. Such a substitution of a false entry in place of the true original, contains all the essential elements of the crime of forgery. This decision is commented on and approved in *Bishop's Crim. Law*, 6th ed., vol. ii. sec. 586.

These considerations apply to the case now in judgment. Hall as representing his superior, makes a correct entry in the official books, but without authority and *malo animo* he changes that for his own gain, yet so as to

make it appear to be still the correct official record of the taxes paid. In other words, "he has made a statement that is purported to be made by the authority and on behalf of another, with intent to defraud and prejudice that other." See *Ex parte Charles Windsor*, 10 Cox, C. C. 123. In short, my conclusion is that a sufficient *primâ facie* case is made out to justify the remand of the prisoner, on the ground that having embezzled municipal money he has committed forgery to endeavour to conceal his guilt.

PROUDFOOT, J.—I think the offence with which the prisoner is charged is forgery at common law. The definition given by Sir W. Blackstone, 4 Com. 247, is "the fraudulent making or alteration of a writing to the prejudice of another man's right." Sir John T. Coleridge in his edition of Blackstone, in a note on this passage says: "This definition seems too confined, if by the words 'to the prejudice, &c.,' it is intended to convey a notion that some one's right must actually be prejudiced by the forged writing; because it is clear that the offence is complete before publication of the instrument, and that it is enough if the counterfeits be such whereby another may be prejudiced." Mr. East defines it as "a false making, a making *malò animo*, of any written instrument for the purpose of fraud and deceit," 2 East P. C. 852. It is not necessary to the sustaining an indictment for forgery at common law, that any prejudice should in fact have happened by reason of the fraud: *Ward's Case*, 2 Str. 747, 2 Ld. Raym. 1461. Nor is it necessary that there should be any publication of the forged instrument: 2 East P. C. 855, 951, 2 Russ. on Crimes, 5th ed., p. 618. I think the evidence establishes a *primâ facie* case against the prisoner of having altered the figure 5 to 3 in the final column, thus making it appear that the money received was less by \$200 than it really was; and that this was done for the purpose of fraud and deceit.

If publication or uttering were requisite to constitute the crime, the forged entry in books of the public character

of those in question would be published as soon as made. The books belonging to a public municipal office, they were not the books of the prisoner, and he had no right to prevent the inspection of them by any one interested. But according to the cited authorities uttering is not necessary. Uttering is a distinct offence in itself, to which penalties are attached by statute.

But I am further of opinion that the offence with which the prisoner is charged would be a crime under our laws relating to forgery, either under sec. 26 or sec. 45 of the 32-33 Vict. ch. 19. Under section 26, forging or altering any account book or thing written or printed, or otherwise made capable of being read, with intent to defraud, is liable to the punishment mentioned there. This 'made capable of being read,' does not mean, as was argued, being read in evidence. It plainly refers to the mode in which the writing or printing is made to appear so as to be read, so as to be legible, it might be by lithography, stamping, &c.

By section 45, whosoever maliciously and for any purpose of fraud or deceit, forges any document or thing written, printed, or otherwise made capable of being read, is guilty of felony.

These are both sections of the Act relating to forgery.

But it was contended that the crime charged must have been forgery under our law at the date of the treaty, 1842, and as this act, which for the first time makes altering an account with intent to defraud a forgery, was not passed till 1869, the prisoner cannot be held under it.

The Imperial Statute of 1870, (a) regulating our practice as to extradition, however, disposes of this objection, as it provides that the list of crimes for which persons are liable to be extradited, is to be construed according to the law existing in England, or in a British possession (as the case may be) at the date of the alleged crime, whether by common law or by statute made before or after the passing of that Act. And in that list of crimes is forgery, counter-

(a) 33-34 Vict. ch. 52.

feiting, and altering, and uttering what is forged, counterfeited or altered.

The same provision is contained in the Amending Act of 1873. (a)

Independently of this provision it has been held by the American Courts and text writers on International Law, that extradition treaties should receive such a construction. *Wharton* in his *Conflict of Laws*, 2nd ed., sec. 836, says it is sufficient if the offence charged be a crime in the asylum State at the time of its commission, though it was not so at the time of the execution of the treaty. And in *Traugott Muller's Case*, 5 Phil. 289, the same proposition was acted on. The judgment was delivered by Cadwalader, J., and his reasoning appears to me to be quite satisfactory.

I think, therefore, the prisoner should be remanded for extradition.

FERGUSON, J.—The prisoner William A. Hall, who was chief clerk in the office of the comptroller of the city of Newark, in the State of New Jersey, one of the United States of America, is charged with having committed the crime of forgery by making an alteration in the figures in the cash-book of the city of Newark, in that office, with the fraudulent intention of obtaining and keeping \$200 of the moneys received in the office. He is now in the custody of the sheriff of the county of York, having been committed to such custody pursuant to proceedings had for his extradition for such alleged offence.

This is an application for his discharge upon a writ of *habeas corpus*. A former application was made before Mr. Justice Osler, but it was not successful, and the facts alleged against the prisoner seem to be well and clearly stated in his judgment, a copy of which was given us upon the argument.

That judgment will, no doubt, be reported in due course, (b) and it seems unnecessary for me to state these facts again here. The way in which the charge is urged against the

(a) 36-37 Vict. ch. 60.

(b) Now reported, 9 Pr. R. 373.

prisoner is this: The Newark Savings Institution, on the 18th day of March, 1881 paid into the office of the comptroller a "tax bill," as it is called, the amount being \$562.32. This sum was entered by the prisoner in the cash book in the column headed "Totals." Other columns were in the same book in which were to be entered other sums which in the aggregate amounted to this sum. These sums were respectively \$7.70, \$72.08 and \$482.54. These appeared in another book in the office called, I think, the "arrears book," and it is said that the prisoner on the same day altered the figure "5" in the \$562.32 to the figure "3" making the amount of \$362.32 instead of \$562.32, and that on entering the other three sums in their respective columns he entered the \$7.70, \$72.08 and \$282.54 so that being added together they would make the sum \$362.32 instead of the sum \$562.32, the prisoner being thereby enabled to have his addition of the column headed "totals," shewing the day's receipts of cash correct, and the addition of these three sums in the other columns correct, making the sum \$362.32, and at the same time fraudulently retain to himself the sum of \$200; and the question for consideration seems to be whether or not this constituted the offence of forgery or the utterance of forged paper, within the meaning of the treaty commonly known as the Ashburton Treaty.

The offence of forgery is defined in Blackstone's Commentaries, vol. iv. p. 248, as "the fraudulent making or alteration of a writing to the prejudice of another man's right." This the author says is the definition at common law, and the same definition is given by Greenleaf, by Archbold, Roscoe, and others.

In *Russell on Crime*, 4th Lon. Ed. (9th American), vol. ii. p. 709, it is said: "Forgery at common law has been defined as 'the fraudulent making or alteration of a writing to the prejudice of another man's right,' or more recently as 'a false making, a making *malo animo* of any written instrument, for the purpose of fraud or deceit,' the word "making" in this last definition being "con-

sidered as including any alteration of, or addition to, a true instrument." In the same volume at p. 768, it is stated to be a settled rule that the counterfeiting of any writing, with a fraudulent intent, whereby another *may* be prejudiced, is forgery at common law, and at p. 774, it is said: "With respect to the fraud and deceit to the prejudice of another's rights, it should always be kept in mind that, although in cases of forgery, properly so-called, it is immaterial whether any person be actually injured or not provided he *may* be thereby injured, yet the fraud and intention to deceive constitute the chief ingredients of this offence," and many cases are there cited to shew the correctness of this statement.

In *Bishop on Criminal Law*, 6th Ed., this passage occurs at p. 325, sec. 587: "If one fraudulently alters a book of account, whether originally kept by himself or another, it ceases to be what it purports, namely, the actual record of transactions made when they occurred. Therefore he commits forgery. But, if he simply enters a false charge against one, he does not thereby substitute a false record for the true original, he merely creates an original record which is not true in fact. "To do this is not forgery."

In the case *The State v. Young*, 46 N. H. 266, referred to in *Bishop on Criminal Law*, sec. 586, a learned Judge is reported to have said: "To forge a writing necessarily implies that a writing be made which shall appear and purport to be something which it is not in fact, or that a writing be so changed or altered that it shall not be, or purport to be, what it was designed to be. But in making a false account, the writing is what it was designed to be." Many other definitions of the offence might be referred to, but they all seem to amount to the same, or about the same, thing.

Now if the prisoner actually did, when the money came into the office of the comptroller, make the entry of the \$562.32 and afterwards, for the fraudulent purpose of obtaining and keeping \$200, alter the figure "5" into the figure "3," and then or afterwards make the false entry in

the other column of the cash book of \$282.54 instead of \$482.54, the true sum, as is charged against him, I am of opinion that in making this alteration he committed the offence of forgery at common law. The book appears to have been the property of the comptroller. As soon as this entry was made in it, it became and was a "writing." I think, within the meaning of the definition, the alteration, if for the purpose stated, was certainly fraudulent, and was, I think, to the prejudice of another man's right, or was at least such as might prejudice another, within the meaning of the definition given in Russell, to which I have referred. It seems to me that such an alteration and falsification of the comptroller's book might prejudice him in more ways than one. Again the book, by reason of the alteration, ceased to be what it purported to be, namely, the actual record of the transactions as they took place. For the true record a false one was substituted. The entry of the \$282.54 instead of the \$482.54, may well have amounted to no more than the making of a false account, but the alteration, if made as is charged, stands, in my opinion, in a different position, and is, as I have said, forgery at common law, and I am of opinion that the evidence against the prisoner would be sufficient to justify his apprehension and commitment for trial upon an indictment at common law if the alleged offence had been committed here.

Owing to the view that I entertain and have stated, it is not necessary that I should say anything in regard to our statute law or the statute law of the foreign country.

I think this case easily distinguished from the case *Re Windsor*, 6 B. & S. 522, referred to by Mr. Justice Osler. In that case there was only the making of a false account, which professed to be the teller's own account. In this case there was (assuming the case to be in fact against the prisoner), the alteration of an account which professed to be the account of the comptroller. If the law of the case *Re Windsor* had to be followed I cannot avoid being of the opinion that there would be much difficulty. In

that case the learned Chief Justice placed a construction upon this part of the treaty resting in part upon the presumption that the criminal law of the United States was the same as the law of England. In this case the evidence shews that such is not the fact. Mr. Justice Blackburn said: "Forgery is one of the crimes specified in the treaty and that must be understood to mean any crimes recognized throughout the United States and in England as being in the nature of forgery." It would, in my opinion, be a difficult matter to ascertain what crimes are so recognized throughout the United States if it is assumed that the evidence in this case regarding the foreign law, is correct.

I see, however, that the editor of the twelfth edition of "Kent's Commentaries," in referring to the case *Re Windsor*, vol. i. p. 37, n. 1, says: "Probably, in general the terms of the treaty with England are to be construed as applying to those acts which are recognized throughout the United States and England as constituting the specified crime."

I am of the opinion that the arguments in favour of the prisoner cannot succeed, and that he must be remanded.

[This judgment was afterwards carried to appeal, and the appeal dismissed: 8 A. R. 31. A writ of *habeas corpus* was subsequently issued returnable before the Divisional Court of the Common Pleas Division, and upon the return thereto the prisoner was remanded: See 32 C. P. 498.—REP.]

[CHANCERY DIVISION.]

GUEST V. GUEST.

Foreign divorce—International comity—Domicil.

Where one obtained a divorce from his wife in a foreign state, in which he was *bonâ fide* domiciled, by proceedings of which notice was served personally on the wife living here, which were not collusive, nor contrary to natural justice, and for adultery on the wife's part.

Held, that entire credit must be given to the foreign divorce in this Province, although the wife at the time of the divorce proceedings resided here, for the domicil of the husband was the domicil of the wife, and the validity of the divorce depended on the law of the domicil of the parties.

THIS was an action for alimony, brought by Maude R. Guest, plaintiff, against Thomas P. Guest, defendant. The plaintiff's statement of claim was delivered on May 20th, 1882. In his statement of defence, the defendant alleged, that subsequently to the delivery of the plaintiff's statement of claim and on June 5th, 1882, the defendant was divorced from the plaintiff by a decree of divorce, pronounced by the Court of Common Pleas, within and for Williams County in the State of Ohio, one of the United States of America, he being then, and at the time of his present defence, a resident of Williams County in the said State; and the defendant went on to allege that on several distinct occasions the plaintiff had been guilty of adultery with various persons at the times and dates therein specified.

The particulars as to the marriage of the parties, and the divorce thus set up by the defendant, and the rest of the facts of the case sufficiently appear in the judgment of the learned Chancellor.

The case was heard at Stratford on October 27th, 1882, before Boyd, C.

W. C. Moscrip, for the plaintiff.

J. Idington, Q. C., for the defendant, submitted the claim should be dismissed on the ground of the divorce.

November 15, 1882. BOYD, C.—The marriage of these parties took place in the State of New York, in October, 1876, and is to be treated by me as validly celebrated according to the law of that country. They came to reside in this Province, and thereafter it is alleged the husband deserted his wife, which abandonment is the foundation of her claim for alimony. The defence is, that the marriage has been dissolved by virtue of a decree for divorce obtained by the husband from the Court of Common Pleas in the State of Ohio. It is in evidence that the husband removed to that State in July, 1877, and has since lived there, engaged in the practice of medicine. While so resident, he took proceedings for a divorce, on the ground of his wife's adultery, and notice of such proceedings was served personally on the wife while living in this country. No defence was made, and a decree was obtained after the hearing of witnesses examined on the part of the husband. The adultery charged was said to be committed in this Province. No proof of the fact of adultery was given at the hearing of this cause, but a decree was sought on the ground that the divorce was a proceeding *in rem* to be acted upon by the Courts of this country according to the principles of international comity.

The validity of a divorce depends on the law of the domicile of the parties at the time the proceedings were begun and judgment given. At this time the husband was resident in the State of Ohio, and the Court of that State entertained jurisdiction. I see no reason to doubt that the husband was a *bonâ fide* resident there, and that the State Court may well have held that such a residence amounted to his being domiciled there: *Brodie v. Brodie*, 2 Sw. & Tr. 259. This being so, then, the domicile of the husband was the domicile of the wife so as to give jurisdiction to the Ohio Court: *Niboyet v. Niboyet*, L. R. 4 P. D. at p. 14; *Wilson v. Wilson*, L. R. 2 P. & D. 435, 442.

There is no evidence that the proceedings which resulted in the decree of divorce were collusive, or that they were

conducted in a way contrary to natural justice. The cause alleged was such as to entitle the party injured to a severance of the marital relation wherever Christianity is accepted. In these circumstances it is my duty to give entire credit to the foreign decree, and to hold that its effect of dissolving the marriage should be recognized and acted on in this Province. The result is, that the plaintiff has no *locus standi*, and her action must be dismissed. No declaration need be made in the judgment as to the grounds of my decision—a simple dismissal will sufficiently protect the defendant against any subsequent litigation for alimony.

[CHANCERY DIVISION.]

NORTHWOOD V. THE CORPORATION OF THE TOWNSHIP
OF RALEIGH.

Drainage—Overflow—Public drainage work—Municipal law—Drainage Acts—Damages—R. S. O. ch. 174—Ib., ch. 199.

Where a municipality, acting under the Ontario Drainage Act, in pursuance of a scheme for the drainage of their township, constructed a system by which water was drained off into a certain drain formerly constructed through the plaintiff's land and running into a natural creek, whereby the creek, by reason of the accumulation of water caused by the new drains, though sufficient before to carry off the water brought down into it, overflowed and injured the plaintiff's land.

Held, that the defendants were liable for any damage thus caused to the plaintiff, and there was nothing in the municipal or other legislation of this Province to change the illegal character of such an Act.

It appeared, however, that the plaintiff's property had been benefited by the drainage works as a whole to a greater extent than it had been injured by the overflow complained of, and the defendants acceded to the reasonableness of the plaintiff's demand for a better outlet, and were proceeding to make it.

Held, that under these circumstances it was sufficient for the present to declare the plaintiff entitled to have the creek widened and deepened to the necessary extent within a reasonable time.

THE writ in this action was issued on August 16th, 1882. The plaintiff, John Northwood, by his statement of claim, alleged that he owned in fee simple, and farmed lot 6, concession 4, by the western boundary, of the Township of Raleigh, in the County of Kent, against the corporation of which township he brought this present action: that a large drain ran through and across the said lot, made about ten years ago by the Ontario Government for draining the said lands, which drain was transferred to the defendants and formed part of the system and scheme of drainage of the said township: that since the construction of the said drain, and since its passing into the defendants' charge, the defendants had constructed a large number of other drains, south, east, and west of his land, leading into the part of the said drain higher up than the part of the drain at his land, and thereby greatly increased the flow and quantity of water into the said drain; but the defendants neglected to enlarge the part of said drain running through his land

and below it, or to provide a sufficient outlet for the water so brought into the said drain, whereby the water so brought into the said drain spread over his land and destroyed his crops, and rendered the said land unfit for cultivation: that the defendants had wholly neglected their duty of keeping the part of the said drain running through his land in a good state of efficiency and repair, and allowed the said drain through his farm and below it to become filled up and wholly incapable of carrying off the water which was brought into it, whereby his crops on the said lands were destroyed, and the land rendered useless and unfit for cultivation. And the plaintiff claimed \$2000 damages, and that the defendants should be ordered to clear and enlarge the said drain through his land, and maintain a sufficient outlet for the volume of water coming down the said drain.

By their statement of defence, the defendants said, that the drain crossing the plaintiff's land and originally called the Raleigh Plains Drain, was first made under a by-law of the Township of Raleigh, and was intended for an outlet of the waters coming from the said Township of Raleigh, and a portion of the Townships of Harwich and Tilbury East, that naturally flowed to the locality of the said drain and made their way through the marshes to Jeannette's Creek, into which the said drain empties, and was so used for an outlet for the said waters until the government drains therein-after mentioned were constructed: that the Government of Ontario under the powers of the "Ontario Drainage Act," (a) laid down a scheme for the drainage of a large portion of the Township of Raleigh, and constructed two large drains called No. 1 government drain and No. 2 Government drain, and of which system of drainage the drain crossing the lands claimed by the plaintiff formed the principal outlet, and the said drains were intended to carry the waters flowing naturally from the Townships of Raleigh, Harwich, and a portion of Tilbury East, by their natural water-courses and channels through to the marshes at the

lower part of the said Township to the waters of Jeannette's Creek, which flows through said marshes to the River Thames, said drain being also intended for an outlet for the various smaller drains constructed and to be constructed in the various watercourses and channels leading into said drain for the benefit of the inhabitants of the said township, who were taxed for the construction thereof: that the land claimed by the plaintiff was situate in a low and marshy locality at the head of Jeannette's Creek, and is nearly on a level with the waters of the said creek, and that the said creek was affected by the rise and fall of Lake St. Clair, into which the said creek emptied through the River Thames: that any overflow that took place over the plaintiff's lands from the said drain was caused by the rise of and backing up of the waters from the lake in said creek, and not by any drains constructed by the defendants: that they had not by the construction of other drains into the said Government drains caused any overflow of water upon the plaintiff's land, but that the defendants had provided sufficient outlets for the requirements of the said drains, and that the plaintiff had not sustained any damages in consequence of an insufficient outlet to the said drains, and that the said outlets had been kept in sufficient repair: that it was not their duty to increase or enlarge the outlet of the said drains, except as such duty might devolve upon them by virtue of the Acts relating to drainage by municipalities upon the proper petition of the resident owners of the locality intended to be benefited, and whenever such petitions had been presented to them they had at once and with all due diligence taken steps to increase said drainage as required by the said inhabitants: that the land claimed by the plaintiff had been greatly improved by the said drainage, and had been re-claimed from a state in which it was totally unfit for cultivation by reason of its wet and marshy nature, and had been and was then greatly increased in value by the said drainage works: that all the drains constructed by them in the said municipality had been constructed by them under the

powers and authority vested in them by the various Acts of the Province of Ontario relating to municipal institutions, of which Acts they claimed the benefit: that the plaintiff was not entitled to the relief he asked in this Court, but that his remedy for any grievance he might have, if any, was by reference to arbitration under the various Acts relating to drainage works of the Province of Ontario, and not in this Court. And the defendants also submitted that the corporations of the Townships of Harwich and Tilbury East, who used the said outlet across the lands claimed by the plaintiff and who were liable for the maintenance and repairs thereof, were proper and necessary parties to this suit.

The plaintiff joined issue on these allegations of the defendants.

The hearing of the case was commenced on September 28th, 1882, at Chatham, before Boyd, C., but after certain of the evidence had been taken, it was decided that the rest should be taken before the Master, and that the case should be argued at Toronto.

The evidence adduced sufficiently appears in the judgment.

On October, 20th, 1882, the case came up for argument before Boyd, C., at Toronto.

W. Douglas, for the plaintiff. The defendants had no right to bring surface water and collect it on the plaintiff's land. R. S. O. ch. 174, sec. 534 shows that an outlet must be found for the water. We have a right to have the lands as they were after Government drain No. 2. The plaintiff forbade the cutting of No. 2 embankment before it was done. It is summer freshets which do the harm. Ordinarily they would not injure the land at all, but now the effect is to scorch the plaintiff's crops and kill them. The Raleigh Plains drain was an incomplete drain, and the defendants could go on and complete it without any petition. He cited *Rowe v. Corporation of the Township of Rochester*, 29 U. C. R. 590; *Beamish v. Barrett*

16 Gr. 318; *Grand Junction Canal Co. v. Shugar*, L. R. 3 Ch. 483; *The Attorney General v. The Council of the Borough of Birmingham*, 4 K. & J. 528; *The Mersey Dock and Harbour Board v. Penhallow*, 7 H. & N. 329; *Scroggie v. The Corporation of the Town of Guelph*, 36 U. C. R. 534; *Coghlan v. The Corporation of the City of Ottawa*, 1 App. 54; *Noble v. The Corporation of the City of Toronto*, 46 U. C. R. 519; *Nicholl v. The Canada Southern R. W. Co.*, 40 U. C. R. 583; *Coe v. Wise*, L. R. 1 Q. B. 711; 36 Vict. ch. 38.

J. MacLennan, Q. C., for the defendants. No charge is made of any impropriety of the council in the construction of the drains, but only that a larger quantity of water is brought down, and no provision is made for carrying it off. No negligence is alleged nor any charge of illegality or want of authority in making the drains. The question is, whether the plaintiff's land has been damaged or benefited on the whole. If its value has been increased on the whole, then no damages can be recovered by him. When the plaintiff first discovered the outlet was not large enough, he should have petitioned the council, according to the practice. The increased body of water was lawfully brought down, and the sole question is, should the defendants provide an outlet? It is not shewn that any water was diverted from its natural course, See R. S. O. ch. 199, sec. 3. The policy of the Legislature is, that each land owner should open such ditches as will carry off water in a natural flow. See also 33 Vict. ch. 2; 36 Vict. ch. 38; R. S. O. ch. 33; R. S. O. ch. 174, sec. 529 *et seq.*; Municipal Act of 1873, 36 Vict. ch. 48; 22 Vict. ch. 99, sec. 270 C. embodied in C. S. U. C. ch. 54, sec. 277. The policy of the Acts is in favour of drainage in every way. The defendants brought the water down to a channel provided by nature, not as in *Rowe v. The Corporation of the Township of Rochester*, 29 U. C. R. 590, to a place where it would never have come. The capacity of the natural channel is insufficient, but that is not the defendants' fault. What obligation rests on the defendants to widen this

creek at their own expense? It is to be enlarged under the drainage Act. If the council won't do it, the plaintiff will have to do it himself. What right have we to go on the plaintiff's land and appropriate it? He would rightly claim payment for the land taken; we could not go on the land, except under the provisions of the statute. As to the embankment, it was a nuisance, because it stopped water naturally flowing from the Raleigh plains down to Jeannette's Creek; the council did right to abate it. All the defendants have done has improved the outlet, nothing has been done to injure it. There was no allegation of negligence here. The ground of complaint is non-feasance that we have not done more. The plaintiff's remedy is to ask the defendants to go on and complete, as he seeks under the statute, but he has no cause of action. If he has sustained any real damage his remedy is under R. S. O. ch. 174, sec 545, by arbitration. *Danard v. The Corporation of the Township of Chatham*, 24 C. P. 590, was a case of bringing down water in larger volume on the plaintiff's land without clearing the way for it.

Pegley, on same side, referred to *Smith v. The Corporation of the Township of Raleigh*, 19 C. L. J. 346. (a)

W. Douglas, in reply. I dispute the proposition that the statutes of Ontario have varied the law with reference to surface water: *Nichol v. Canada Southern R. W. Co.*, 40 U. C. R. 583. As to the pleadings the statement of claim shews the injury and how it was sustained. We have a right to be as we were before the embankment was cut. We were assessed for this work and should get the benefit of it. It is negligence not to provide a proper outlet. The result shews negligence. Under R. S. O. ch. 174, sec. 534, there must be fall enough to carry off the water. It makes no difference that the drains run into the bed of a water-course. The question is, is it enough to bring the water to a water course, if that is quite insufficient to discharge the volume of water to be brought down? Under R. S. O. ch. 174, sec. 529, sub. s. 7, there is full power to complete

(a) This case will appear in a later part of this volume.—Rep.

drains that are incomplete and to repair drains as they need it. Sec 542 provides for clearing out. In *Danard v. The Corporation of the Township of Chatham, supra*, the cause of action was considered too trivial. I refer to *Rowe v. The Corporation of Rochester*, 22 C. P. 319, and to the cases cited therein. It should be referred to the Master to ascertain damages, and the defendants should be required to make such an outlet as will carry off the water.

November 22, 1882. BOYD, C.—Before there was any drainage the land in question formed a part of the Raleigh Plains, which were neither more nor less than a wet marsh all the year round, utterly unfit for cultivation. There was a slight change for the better when the first drain was made in 1864, which confined the outspread water to a defined channel from the Duck pond at the head of the plains to the Drake road, where it crossed Jeannette's Creek, on the eastern boundary of the plaintiff's land. The effect of this was that one might get an occasional crop on a few acres of this land in a dry season. In this state of affairs the Ontario Government, in 1870, projected a comprehensive scheme of drainage, by which it was intended to supply two main arteries to serve for the draining of the whole township. McDonald, the Government engineer, in the construction of these drains 1 and 2 deviated from the original plans and specifications, and carried out the work on the ground so as to divide the township by means of drain No. 1, into which he intended the east half of Raleigh to be drained, leaving the lateral drain No. 2 to serve for the west half. It appears that the construction of No. 1 was first proceeded with, and in pursuance of his plan McDonald closed the old Raleigh Plains drain, which intersected No. 1, by an embankment on the west side of No. 1, whereby the water that would naturally have flowed to Jeannette's Creek was diverted into the River Thames by an artificial direct course. It was about this time, and in 1871, that the plaintiff bought his land at the price of \$10 an acre. He speaks of that as the driest year he had, no doubt

because the embankment of the old Plains drain greatly relieved the output of water at Jeannette's Creek. The plaintiff speaks of beginning to be damaged in 1872, and this is no doubt the result of the demolition of the embankment which was made in that year by Mr. Dobson, a commissioner appointed by the municipal council, who ratified his act in September, 1872. The witness Bennet says that the old Raleigh Plains drain was stopped as an experiment on the part of the engineer: that the obstruction by the embankment was intended to be temporary, but that it was found to have the effect of overflowing lands to the east, where they never had been overflowed before. Other witnesses prove that this embankment would not have stood the pressure of the water, which must sooner or later have burst through and found its way to Jeannette's Creek. I do not doubt, upon the evidence, that this embankment was a mistake.

The Government drains were nearly completed in 1873, but were not finished till 1874-5, under the superintendence of Mr. McGeorge as the Government engineer. Before they were finished the municipality took action on a petition for the enlargement of the old Raleigh Plains drain, and duly passed a by-law for the deepening and the widening of it in July, 1874. McGeorge was also the engineer of the municipality in this work. It becomes important at this point to observe more particularly upon the original Government scheme from which the engineer deviated. By the plans and specifications drain No. 1 was not to be constructed continuously, but in two divisions; the first and greater division was to drain the country to the south and east of No. 2, and was to discharge into drain No. 2 at the intersection of the road allowance between lots 12 and 13, and the 6th and 7th concessions of Raleigh. This would have the effect of draining the greater part of the plains, as nature intended, into Jeannette's Creek. The other and lesser division of drain 1 (called the north part) was to run from this point of intersection to the river Thames, and was only intended to drain to the north and

east of drain 2. When McGeorge proceeded with the enlargement of the Raleigh Plains drain he found the embankment cut, and he enlarged the drain continuously along the line of the old original drain from the Duck pond to the Drake road.

The cutting of this embankment and the enlargement of the old drain were practically restorations of the original Government plan, which was conceived with a due regard to the natural features and trend of the region to be drained. There is evidence that this was done with the approval of the Government. It was found to be a blunder to endeavour to block up the natural flow of the plains water, and in 1874, before either of the Government drains were completed, the attention of Mr. Molesworth, an officer representing the Government, was directed to this particular point by McGeorge, the engineer in charge of all the works. The latter pointed out that No. 1. would not be sufficient to carry the water from the east down to the Thames, and that an embankment if made or left there would be destructive to the lands in the east. Whereupon the work for the completion of the Government drains and the Raleigh enlargement went on simultaneously, and the latter was made, as it now is, a continuous drain, and the embankment then down was not replaced. The plaintiff made a strong point of the fact that he was assessed for the Government drains, and that he was deprived of the benefit of drain 1, as McDonald constructed it, but for reasons already sufficiently manifest, I do not regard this contention as entitled to any weight.

Jeannette's Creek, intersecting the plaintiff's land, was originally the natural outlet for the waters of the township, and the change made in abandoning the experiment of Mr. McDonald, and reverting in substance to the first scheme of the Government, was a beneficial one to the public. Of this the plaintiff cannot complain; he bought the land in question while the Government works were in progress and subject to whatever changes might be properly made therein.

Then the scheme of the Government and the municipality as carried out recognized Jeannette's Creek as the proper *terminus* of the system. The channel of this creek on the plaintiff's land at the Drake road was sufficient to carry off the waters of the old Raleigh Plains drain, but it was insufficient for the passage of the accumulation of waters brought down by the junction of the new and enlarged drains at that point in 1875. Its inadequacy, not perhaps very noticeable at first, has within the last three years become more apparent owing to the necessary extension of the drainage system arising from the gradual settlement and cultivation of newly occupied country to the south, and towards Lake Erie. This is covered more or less with surface water without living streams. A series of drains have thus been made, ramifying in every direction, but possessing the general characteristic of being enlargements or deepenings of natural channels and swales. In his evidence the plaintiff complained chiefly of the water brought down by the enlarged Raleigh Plains drain, which conveys nearly two-thirds of the whole flow. That flow is more than double what it was at first.

Now it is to be noticed that the plans for making a suitable outlet at Jeannette's Creek have not been carried out. By the Government specifications drain 2 was to have its outlet at Drake's bridge to discharge into Jeannette's creek, which was to be cleared out and widened for that purpose, for a distance of 4,000 feet in a westerly direction, along the channel of the creek.

In a letter from Mr. Molesworth dated 16th May, 1874, and addressed to Mr. McGeorge, it is stated "levels and measurements are required on Jeannette's creek from the mouth of No. 2 drain for clearing and widening as far as required." McGeorge in his evidence says the work west of Drake road was not projected on the original plans, [I have not seen these, but the work was mentioned as I have said in the specification,] but 1,600 feet of work was done there from the Drake road. That would extend about two-thirds across the lot in question. He says he did as

Molesworth directed as far as he thought necessary. McDonald says: "In my opinion it was necessary to enlarge the creek to carry off the water in No. 2. I projected and recommended this, but it was not carried out." It is evident, if the work of deepening and widening was carried out for 4,000 feet it would go across the whole of the plaintiff's lot and nearly the whole of the next lot, and this would bring the channel-enlargement down to the place where the witnesses speak of the creek as being 100 feet wide. But Mr. McGeorge also says: "I made no provision for the further outlet for the Raleigh Plains drain when it was afterwards enlarged. I did not consider the effect of the water so brought down on the lands there." Nevertheless it appears to have been contemplated that some such provision was to be made, as I find in the printed by-law of July, 1874, that the report of the surveyor provides for the widening and deepening of the Raleigh Plains drain through lot 6, in the 4th concession, which is the plaintiff's lot and the land now in question.

The plaintiff has given evidence which shews that his land is to some appreciable extent injuriously affected by floodings in June arising from the insufficient outlet provided at Jeannette's creek, and this as against the defence set up that the outlet is sufficient, and that any damage is occasioned by the back flow of waters from Lake St. Clair. As he graphically puts it, "the overflow is caused by trying to run 74 feet of water through 22 feet of drain." It is not impossible or even very difficult to remedy this, and various schemes were suggested by different witnesses which I need not now dwell upon. The fact that a natural channel for some drainage afforded by Jeannette's creek is no reason for surcharging that stream with more water than it can hold. The injury thus arises from circumstances not unlike those in *Geddis v. Proprietors of the Bann Reservoir*, L. R. 3 App. Cas. 430, where the bed of a small river was insufficient to receive and carry off the additional quantity of water discharged therein by the defendants whereby it overflowed and injured the adjoining land

The failure to provide a proper passage for the water when it is brought down to this creek practically results in a periodical temporary obstruction of the natural water-course on the plaintiff's land to his prejudice. On the part of the defendants this is negligence and gives a cause of action to the plaintiffs: *Hiscox v. Lander*, 24 Gr. 250; *Fleming v. The Mayor and Corporation of Manchester*, 44 L. T. N. S. 517; *Michell v. Mackear*, 6 L. R. Ir., p. 49. The failure to provide a proper outlet was a palpable and obvious blunder, and brings the defendants within the well known definition of Alderson, B.: "Negligence is the omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do:" *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781.

If an individual collects surface water dispersed over his land, which would naturally disappear by absorption or evaporation, and by means of a trench carries it off in a stream so as appreciably to injure his neighbours, he commits an unlawful act. This common law doctrine I do not find to be displaced by any legislation as was argued at the bar. And similarly, if any body of individuals or corporation so act—that is, collect and discharge upon the land of a private owner a body of water which would otherwise not have found its way there—they offend against the law. I find nothing in our municipal or other legislation to change the illegal character of such an act. If a municipality undertakes the responsibility of constructing a system of drainage works by which the surface water distributed over a large territory is gathered into one channel, and then discharges that volume of water upon the lands of a farmer without providing any proper outlet, it would be strange indeed if the spoliation of property resulting therefrom should not be made good by the body so offending. The immunity afforded to public bodies in such undertakings by the various statutes consists in this, that all statutory prerequisites having been

observed, they are clothed with authority to expropriate the land, raise the money, and do the work contemplated. But (adapting to the facts here the language of Lord Selborne in the *Geddis Case*,) if the Act gives power to this corporation to convey by means of these channels to a natural outlet a body of water which would not otherwise in the same manner naturally pass down these channels, and to do all things necessary and proper therefor, that power does not enable or authorize them to flood the lands of the neighbouring proprietor unless it would be impossible to avoid or prevent such flooding by any reasonable and proper use of their statutory powers: L. R. 3 App. Cas. at p. 452. It is equally the law that the user of such powers does not warrant the flooding of private lands or streams at the outlet of the channel unless under like conditions, which it is not pretended exist here.

Yet notwithstanding all the drawbacks arising from the imperfect or incomplete outlet on the plaintiff's land, it is very clearly proved that his property has been largely benefited by the construction of the drainage works as a whole. One striking manifestation of this is found in the fact that he now holds his land at \$50 an acre, and is getting \$4 per acre as rent for it. This consideration induces me to come to the conclusion that he has not sustained loss by the partial flooding of his land, for which he should recover as against the defendants. The principle of the Acts relating to compensation for lands taken or used or injuriously affected by the exercise of municipal powers has its application to this claim for damages. It is there provided that the compensation is to be for damages beyond any advantage which the claimant may derive from the work: 36 Vict. ch. 48, sec. 373. The outlet of these drains was of necessity across the plaintiff's land and through his creek. The accumulation of water in his creek, and the backing of water over his land amounted in substance to a taking and using of his property by the municipality, for which the plaintiff can rightly insist on

compensation: *Pumpelly v. Green Bay Co.*, 13 Wallace 166. But if the claim assumed this shape, the set-off of benefit from the whole work as against his damages would obtain and turn the scale against him. The evidence sufficiently shews that the plaintiff has derived less benefit from the drainage works than would have resulted to him had they been properly carried out as planned, and as I understand the evidence. The defendants have acceded to the reasonableness of the plaintiff's demand for a better outlet, and are taking steps to have the work done. This being so, it will be sufficient for the present to make a declaration that the plaintiff is entitled to have the drain continued through his land by widening and deepening the channel and bed of Jeannette's Creek as may be found necessary, with leave to apply if this is not done within a reasonable time, say six months. It is to be hoped, however, that the parties will arrange this without further reference to the Court. The plaintiff should get his costs.

[CHANCERY DIVISION.]

RE KIRKPATRICK, KIRKPATRICK ET AL. V. STEVENSON
ET AL.

Executor—Statute of Limitations—Residue—Trustee and cestui que trust—
R. S. O. ch. 108, sec. 23.

Where A., one of two residuary legatees and executors, left the collection of the outstanding assets of the deceased entirely to B., the other residuary legatee and executor, under an agreement between them, by which B. was to remit a moiety when a certain specified amount was collected, and it appeared that the residue was ascertained or could have been ascertained within a year from the testator's death :

Held, that A.'s claim to what was so collected more than ten years before action brought was barred by the Statute of Limitations, but as to what was got in by B. afterwards A. was entitled to recover.

Held, also, that the fact of the fund in B.'s hands having been from time to time drawn upon to make good deficiencies in the general legacies, so that the residue was not precisely and for all purposes ascertained, did not prevent the bar of the statute; neither was there any fiduciary relationship between A. and B., such as to have that effect.

Quære, whether, if the money collected by B. could have been specifically traced and followed, the Court would allow this to be done, notwithstanding the lapse of ten years.

Held, lastly, that the bar of the statute applied not only to assets distributed by B., but also to assets retained by him.

THIS was an appeal from the finding of the Master in Ordinary, barring the claim of the defendant Richard H. Kirkpatrick sent in pursuant to the advertisement for creditors against the estate of one J. C. Kirkpatrick, now being administered by the Court. The plaintiffs by original motion for administration were the children, the beneficiaries under the will of the said J. C. Kirkpatrick, and the defendants were the executors of the said J. C. Kirkpatrick.

The circumstances of the case so far as concerns the present appeal were as follows: One John Kirkpatrick, who died on June 18th., 1860, by his last will dated March 17th., 1860, after certain specific bequests, gave all his real residuary estate real and personal to his sons J. C. Kirkpatrick and Richard H. Kirkpatrick, and appointed them and one George McMicking his executors. All these proved the will, but McMicking had never taken any part in the management of the estate and refused so to do. J. C.

Kirkpatrick kept the books and managed the estate up to the time of his death, which occurred on March 9th, 1880. The present claim was presented by R. H. Kirkpatrick in respect of his half share of the residuary estate of John Kirkpatrick remaining in the hands of John C. Kirkpatrick at the time of his death, as, according to the contention of the said claimant, trustee for him.

It appears that by consent the estate was left in the hands of J. C. Kirkpatrick to be by him wound up and realized, and to be held for or from time to time paid over to his co-residuary devisee Richard H. Kirkpatrick. The estate consisted of lands and securities for money, chiefly mortgages and promissory notes, certain of which were set aside to answer certain specific legacies and annuities, and the realization of the balance, which was not then ascertained, was left to J. C. Kirkpatrick as above mentioned. Payments were made from time to time on account of the residuary estate by J. C. Kirkpatrick to Richard, but none of them within the last six years, and Richard, who for many years past had not had access to the books, supposed that he had been paid the realized portions of the residuary estate of which he regarded his brother as trustees for him, and was still to receive the unrealized portions. An examination however of the books of the estate, which after J. C. Kirkpatrick's death were obtained from his executors, shewed that he had received large portions of the residuary estate for which he had not accounted to Richard, but had mixed with his own funds. The claim as originally brought in amounted to \$38,608.83. The executors of J. C. Kirkpatrick had made an affidavit on production to the effect that they had not, and never had, any accounts or books of account, or vouchers beyond a few unimportant documents, but, it subsequently appearing that they had permitted the solicitors for the plaintiffs to take possession of a large number of books and documents, further production by them was ordered in the Master's office, which when obtained, shewed that some of the securities which the claimant had supposed to

be residuary estate had been transferred to answer specific legacies in substitution for others which had run out, though the moneys representing the same could not all be traced. A supplemental account was then made up giving credit for these securities so transferred, amounting in all to \$11,264.09, less what could be traced in substitution therefor, and reducing the claim to \$32,872.95.

The corroborative proof required by R. S. O. ch. 62, sec. 10, was furnished by tracing the entry of each item claimed in the account back to the original entry in the day book, and shewing that each item was originally entered by J. C. Kirkpatrick in his own handwriting.

The Master ruled as to this claim as follows :

“The case made by the claimant is that after the death of his father, John Kirkpatrick, securities sufficient to meet the various legacies and annuities under the will were set aside for that purpose : that the remaining portions of the estate formed the residuary estate to which J. C. Kirkpatrick, whose estate is now being administered, and the claimant, were entitled in equal shares : that by arrangement between them J. C. Kirkpatrick managed the estate, collected all moneys which have been collected, but has failed to pay over to the claimant a large amount of the money so collected. His contention, is that for the amount so collected but not paid over the testator was a trustee for him.

“The answer made to the claim is, that it is barred by the Statute of Limitations. In my opinion the statute is a bar to the claim. From the account filed no money seems to have been paid by J. C. Kirkpatrick to the claimant for more than six years before the institution of the suit. No acknowledgment of indebtedness on the part of J. C. Kirkpatrick within six years has been proved. The letters put in by the claimant contain nothing which, in my opinion, would constitute a declaration of trust on the part of J. C. Kirkpatrick. It is simply even on the claimant's own shewing a case of money had and received

by J. C. Kirkpatrick to the use of the claimant. As soon as the securities to answer the legacies and annuities were set apart, as the claimant says they were, and the residuary estate ascertained, J. C. Kirkpatrick and the claimant became joint owners of it; and if J. C. Kirkpatrick had possession of it all, as the claimant says he had, the claimant had a right of action to recover it, and the statute began to run. It is now nearly if not more than twenty years since that the residue was, as the claimant says ascertained. For each sum of money received by J. C. Kirkpatrick the claimant could have sued, but not having done this, and there being no payment on account or acknowledgment for more than six years, I must hold that the claim cannot now be enforced."

The present appeal was argued before Boyd, C., on Friday, January 26th, 1883.

D. McCarthy, Q. C., and T. S. Plumb, for the appellant. The Statute of Limitations does not run in this case. Certain securities were set apart to answer the legacies with the privity of both executors, but the fund thus set apart proved insufficient, and it was necessary to draw from the residue to meet the deficiencies. The residue never was ascertained, and so the statute did not begin to run. There was such a dealing between the brothers that the acting executor was created agent for the other: *Cameron v. Campbell*, 27 Gr. 307; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Williams's Law of Executors*, 8th ed., vol. iii. ch. 2 p. 2035. J. C. Kirkpatrick should be regarded as a trustee for the appellant. *City Bank v. Maulson*, 3 Ch. Ch. 334, was also referred to.

J. MacLennan, Q. C., contra, for the executors of J. C. Kirkpatrick. There was no trust between the two sons of John Kirkpatrick, as regards the land; they were tenants in common from the first, and this should be the result also as to the moneys of the residue. There is no direction to collect and receive the residue, and then to divide

it. The two sons are direct legatees of the residue. If one collected the whole residue as common property, it merely gave a right of action to the other, which right is now barred, since the last item collected of the residue was in 1872 or 1874. The right to sue for the residue arose a year after date : *Sheppard v. Duke*, 9 Sim. 567 ; *Downes v. Bullock*, 25 Bea. 54, S. C. in App. 9 H. L. 1. A residue is within the Act as well as any other legacy : *Williams's Law of Executors*, 8th ed., vol. ii. p. 2038 ; *Thompson v. Eastwood*, L. R. 2 App. Cas. 215. R. S. O. ch. 108, sec. 24, came into force July 1, 1877, and changed the law as to the matter of trust. There was assent here : *Williams's Law of Executors*, 8th ed., vol. ii. pp. 952, 1384, 1392.

D. McCarthy, Q.C., in reply. We have ten years from the time when the residue was first set in prior and charges on the estate paid, within which we can sue. No definite ascertained residue is yet in existence. The joint ownership was a joint ownership of what the residue was, when that should be entertained. There has been no legislation as to personal property, such as there has been in the matter of co-partnership of land : *Bright v. Larcher* 27 Bea. 130. The doctrine of assent does not apply to an unascertained residue : *Hennessey v. Bray*, 33 Bea. 96 ; *Teed v. Beere*, 5 Jur. N. S. 381. He also referred to *Prin v. Horniblow*, 1 Y. & C. (Eq. Exch.) 200.

February 14th, 1883. BOYD, J.—By the construction put upon the Imperial Act 3-4 Wm. IV., ch., 27, sec. 40, which is the origin of R. S. O. ch. 108, sec. 23, a legacy, though it be not payable out of land, and though it be of a residue, is barred after ten years : *Sheppard v. Duke*, 9 Sim. 567 ; *Portlock v. Gardner*, 1 Ha. 594 ; *Downes v. Bullock*, 25 Beav. 54, S. C. in App. 9 H. L. 1, 14. This period runs from the time when a present right to receive the residue or legacy has accrued to some person capable of giving a discharge therefor. This right ordinarily accrues at the end of a year from the testator's death : *Benson v. Maude* 6 Madd. 15 ; *Elwin v. Elwin*, 8 Ves. 554.

In *Hickens v. Hickens*, 25 W. R. 249, S. C. 36 L. T. N. S. 10, Bacon, V. C., is thus reported: "How can the residue be ascertained according to the rules of administration in this Court until the end of a year? If there was no authority upon the subject that must, of necessity, be the rule, and until the end of a year neither can the executors discharge their duty by paying the residue, nor at any previous period can the residuary legatee say 'pay me,' because, until the twelve months had expired there can be no residue." The claim in this case is by one of two residuary legatees, who are also executors, against his co-executor for half the residue. It is not contended, nor is it the fact that any suit was necessary in order to ascertain the residue. For all that appears, it was ascertained or could have been ascertained within the year. By arrangement between the executors, the one now in default got in all the outstanding assets, and, it is said, under an agreement by which he was to divide with the other, and remit a moiety when the sums collected amounted to a certain aggregate. For what was so collected antecedent to ten years before the presentation of this claim, I think the bar of the statute applies.

An opinion is intimated by Romilly, M. R., in *Reed v. Fenn*, 35 L. J. N. S. Ch. 464, on an analogous clause of the English Act relating to intestates' estates 23-24 Vict. ch. 38, sec. 13, that the statute applies to assets distributed by the personal representative, not to assets retained by him. But the decisions are against this position. Thus, in *Piggott v. Jefferson*, 12 Sim. 26, Shadwell, V. C., says: "By possessing assets of the testator, the executor became liable to pay the legacy, that is, he became, in a certain sense, a debtor to the legatee for the amount of it; but you cannot say that he or his estate continues liable unless you show that the party claiming the legacy has come in time to demand it out of the assets possessed by him. You cannot, by treating him as a debtor, prolong the time for claiming the legacy." To the same purpose is the language of Bacon, V. C., in *Re Radclyffe*,

29 W. R. 420: "A residuary legatee who asks the executor for his share of the residue is like a person who brings an action for money had and received on his account. It is no more than that."

I do not think the objection that the residue was not precisely and for all purposes ascertained, because the fund in the hands of the acting executor has been, from time to time, drawn upon to make good deficiencies in the general legacies, operates to exempt the appellants from the bar of the statute. That is a sort of uncertainty which more or less attaches to every residue. The Court encourages an early distribution and appropriation of the assets such as was made in the present case with a view to ascertain the residue. The person taking the residue knows that he takes, subject to the testator's liabilities, and in some cases to other legacies, and that he may be required to recoup or discharge these out of the assets that have reached his hands. *Prowse v. Spurgin*, L. R. 5 Eq. 99; *Jervis v. Volferstan*, L. R. 18 Eq. 18; *Hunter v. Young*, L. R. 4 Ex. D. 256.

It is urged again, that the acting executor was a trustee of the moiety of the moneys collected by him, and that the statute is no bar in such a case. It may be, if the moneys could be specifically traced and followed, that the Court would allow this to be done, but this is not the rule or course of the Court where the claim is of a debtor-and-creditor character with a quasi-fiduciary relationship superinduced. The element relied upon in *Teed v. Beere*, 5 Jur. N. S. 381, was that the debt accrued in consequence of a violation of confidence bestowed as the result of a fiduciary relationship, which there was that of employer and confidential clerk. Neither does *Burdick v. Garrick*, L. R. 5 Ch. 233, apply, for that was a case of trust touching the specific moneys manifested by the terms of a written instrument. It is true, as pointed out by Kay, J., in *Banner v. Berridge*, 29 W. R. 846, that Lord Hatherley's language in *Burdick v. Garrick* extends to the case of a trust arising by implication without any actual expression

in words, where property or money wholly and solely belonging to the person who deposits is deposited with another person for the benefit of the depositor. But here the acting executor came lawfully and rightfully into the possession of the assets, of which one-half also belonged to him in his own right as one of the residuary legatees, and by the arrangement he was discharged upon remitting an equivalent for one-half of the moneys received by him, and there was no breach of trust in his dealing with the moneys and using them for his own purposes subject to his accounting and allowing interest for any default or delay in the payment at the proper periods. *Burdick v. Garrick* marks the distinction between moneys directed to be invested in the name and for the benefit of the principal and moneys collected for the purpose of being remitted to him. *Quoad* the money collected, the acting executor had no duty to perform as trustee for the other executor, neither had he any such duty as owner in common of the residuary estate. His receipt of the whole made him a debtor to the other, and the alleged arrangement between them does not carry the matter any higher: *British Mutual Investment Co. v. Smart*, L. R. 10 Ch. App. 576, 577. The precise point I am now dealing with is thus put by Christian, L. J., in *Crawford v. Crawford*, 16 W. R. at p. 412 reversing the Irish Master of the Rolls in S. C. as reported in Ir. R. 1 Eq. 436. He says: "If I hand a sum of money to A B and tell him to pay it to C D, and he promises to do so, and afterwards keeps the money an unreasonable time, the matter is simply a breach of contract, and to describe the relation as that of trustee and *cestui que trust* appears to me to be merely a confusion of terms."

In *Adams v. Barry*, 2 Coll. 292, the suit was in effect by the residuary legatee against the executor who was in possession of assets, and it was argued that if the statute applied it would only run from the time when the residue was ascertained, and not from the death of the testator. The Vice-Chancellor held that the statute did apply, and that as to assets received by the executor more than twenty

years before the filing of the bill there was no right of recovery, but that the plaintiff was not bound as to assets of which the executor had possessed himself within that time. He was thus, evidently, of opinion that a right of action accrued at the time when assets were received applicable to the residuary legacy, and that such a right would also arise from time to time, as subsequent assets were received. But this would be in respect of such assets only, and would not have the effect of opening up the whole account *ab initio*. This view is also in conformity with the opinions expressed in the analogous case of partnership assets in *Knox v. Gye*, L. R. 5 H. L. 656, 678, 687.

As to all sums got in by the acting executor within ten years from the making of this claim, I think he should be allowed to recover; as to all the rest he is statute-barred. With this modification, I affirm the Master's finding, but this should not affect the right to the costs of Appeal, to which the defendants are entitled.

[CHANCERY DIVISION.]

SCANE ET AL. V. DUCKETT ET AL.

Demurrer—Creditor's action—Non-averment of suit "on behalf of all creditors"—Solicitor's action for costs—Pleading—R. S. O. ch. 140, sec. 32—O. J. A., Rules 103, 104.

In an action to set aside a conveyance of land as a fraudulent preference, the non-averment that the plaintiffs sues on behalf of all other creditors is not ground for demurrer, but a mere informality, to be dealt with under O. J. A., Rules 103, 104.

In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not, in his statement of claim, allege that the bill was delivered a month before action brought, is not now, any more than before the Judicature Act, ground for demurrer, but only for defence. Though under R. S. O. ch. 140, sec. 32, the right of action on a bill of costs may be suspended pending a month from delivery, nevertheless the solicitor is a creditor, and may as such, before the expiration of such month, bring an action to set aside a voluntary conveyance as fraudulent and void.

THIS was a demurrer to a statement of claim. The plaintiffs were a firm of solicitors, and brought this action against Daniel Duckett and Whitfield Tillison, claiming to have a certain conveyance of land made by Duckett to Tillison delivered up to be cancelled on the ground that it was fraudulent and void as against them, having been made for no valuable consideration, but for the purpose of defeating and delaying them, or of preferring Tillison, and being in contravention of 13 Eliz. ch. 5 and 27 Eliz. ch. 4 and R. S. O. ch. 118. By their statement of claim the plaintiffs set out that under Duckett's retainer they had commenced a certain action on his behalf, which they had subsequently on his instructions discontinued, when on his request they "duly delivered" to him their bill of costs, which had been duly taxed at \$346.56. They also alleged that, besides the amount of these costs, Duckett was indebted to them in the sum of \$15, the particulars of which were endorsed on the writ of summons. But they did not allege, in their statement of claim, that the said bill of costs had been delivered one month before the commencement of this action. Both defendants demurred to the statement of the defendant Duckett on the ground, (1) that

it showed no ground upon which the plaintiffs were entitled to the relief asked, or to any relief coming within the scope or purport of the claim of the plaintiffs; (2) that it did not shew that the plaintiffs' bill of costs was delivered one month before the commencement of this action; (3) the plaintiffs alone not being judgment creditors were not entitled to maintain this action to set aside the said conveyance as voluntary, and fraudulent and void. The defendant Tillison demurred on the same grounds, and also on the grounds, (1) that the statement did not shew that the plaintiff's had any judgment execution or other charge or lien or claim against the lands in question at the commencement of the action; (2) that it did not show that the plaintiffs had been unable to make their pretended claim, if any, out of the goods or other property of the defendant Duckett; (3) that in any event this action could only be maintained by the plaintiffs for and on behalf of themselves and other creditors as against the defendant Tillison.

The demurrers were argued before Boyd, C., on March 7th, 1883.

M. Wilson, for the demurrers. The plaintiffs do not sue on behalf of other creditors as well as themselves, and therefore there is want of equity: *Duffy v. Graham*, 15 Gr. 547; *Bank of Upper Canada v. Shickluna*, 10 Gr. 157. Moreover a bill of costs is not payable in the eye of the law till a month has expired after delivery, the debt is not recognized till then: R. S. O. ch. 140, sec. 32, 41, 42; Judicature Act, Rules 128, 147. Again, the plaintiffs shew they are not execution creditors. The statement is demurrable for want of equity.

N. W. Hoyles, contra. I refer to *Longeway v. Mitchell*, 17 Gr. 190, as to the ground of want of equity; there is no provision for demurring for want of parties under the Judicature Act: *Werderman v. Société Générale D'Electricité* L. R. 19 Ch. D. 246, which has been followed in *Young v. Robertson*, 2 O. R. 434. As to its not being alleged that

the bill of costs had been delivered a month before action, the statute, R. S. O. ch. 140, does not interfere with the debt, but only with recovery of it. This action is brought on the principle of a bill in equity *quia timet*. We do not even ask for payment. This being so, we are not infringing the principle of the Act. Besides this is not ground for a demurrer, but for a defence: *Dawkins v. Lord Penrhyn*, L. R. 4 App. 515. *Catling v. King*, L. R. 5 Ch. D. 660, also shows that the Statute of Limitations is ground for defence. See too as to practice before the Judicature Act, *Archbold*, Q. B. Practice, 13th ed., pp. 118, 133. Besides, there is another debt shown on the statement, though a small one, apart from the bill of costs. As to the frame of the pleading, it is not artistically pleaded, but *Attorney General v. Midland*, 19 C. L. J. 441, (a) shows that this is ground for an application in Chambers, not for demurrer. I also cite *May on Voluntary Conveyances*, p. 44. And in regard to the way such pleadings should be looked at, I cite *Grant v. Eddy* 21 Gr. 45; *Sawyer v. Linton*, 23 Gr. 43.

M. Wilson, in reply. In the cases cited the charge is inserted that the settlement was to delay, hinder, and defraud creditors, which is not the case here. As to the question of the month, a plaintiff has no right to bring action till a month, because he cannot tell up to then that the bill of costs will not be paid. The plaintiffs must shew their bill was delivered within one month, whereas the case of pleading the Statute of Limitations is different, for there the defendant has to show the cause of action did not arise within the time limited. Rule 147 requires a plaintiff to state every fact on which he relies *Longeway v. Mitchell*, Gr. 190 is, if anything, in our favor. This case follows the case of *Reese River Silver Mining v. Atwell*, L. R. 7 Eq. 347. Such loose pleadings should not be encouraged.

March 14, 1883. BOYD, C. — The objection raised that the plaintiffs do not allege that they sue on

(a) This case will appear in a later part of this volume.—Rep.

behalf of all other creditors is one not now tenable on demurrer. This averment is a mere formality: there is but the one plaintiff whose name is given; the others who are represented are not plaintiffs. They are not bound by the proceedings of him who claims to represent them: *Smith v. Doyle*, 4 App. 471; *Leathley v. McAndrew*, W. N. 75, p. 259 (Huddleston, B.) And whether the action be or be not in terms on behalf of all, the Court will see to it that the proper decree is made for the benefit of all creditors: *Wooldridge v. Norris*, L. R. 6 Eq. at p. 414; *Hooper v. Smart*, L. R. 1 Ch. D. 90.

It may be as a matter of form proper that the writ and claim should state that the plaintiffs are suing on behalf of themselves and all other creditors, and this I will now permit to be done by amendment: *Worraker v. Pryer*, L. R. 2 Ch. D. 110: *Re Royle*, L. R. 5 Ch. D. 540.

In *Ponsford v. Hartley*, 2 J. & H. 736, a like objection to a creditor's bill for administration of realty was held to be a good ground of demurrer for want of equity; but in *Longeway v. Mitchell*, 17 Gr. 190, Strong, V. C., held that in a creditor's suit for equitable interference against alienating lands the omission was not a ground of demurrer as for want of equity. The objection at the highest is one savouring of non-joinder, and is to be dealt with under R. R. 103, 104; *Werderman v. Société Générale D'Electricité*, L. R. 19 Ch. D. 246. The objection should have been taken at the earliest moment, and probably when the writ was served: *Sheehan v. Great Eastern R. W. Co.*, R. L. 16 Ch. D. 59.

The R. S. O. ch. 140 sec. 32 provides that no suit at law or in equity shall be brought for the recovery of fees for business done by any attorney or solicitor as such until one month after a bill thereof has been delivered to the party to be charged therewith. This is the same as the English Act 6-7 Vict. ch 73 sec. 37, and the earlier English Act of 2 Geo. II, ch. 23 sec. 23, mentioned in the cases subsequently referred to. Before the Judicature Act it was enough in a

declaration to set forth what is found in this statement of claim in order to disclose a good cause of action for work done as an attorney. It was not necessary to aver that the bill had been duly delivered a month before action, nor was it necessary to prove this unless that matter of defence was specially pleaded : *Lane v. Glenny*, 7 A. & E. 83. As put by Lord Denman in *Shearwood v. Hay*, 5 A. & E. 388, if an attorney sues without having delivered a bill, that fact is within the knowledge of the defendant, and he ought, if he has no other defence, to give notice of the defect insisted upon to the plaintiff, who may then deliver his bill and bring another action : See also *Robinson v. Roland*, 6 Dowl. 271.

Even in the old days of particularity in equity pleading it was held upon a demurrer similar to this in *Worrell v. Harford*, 8 Ves. 7, 9, that a solicitor suing for his bill of costs need not state in his pleading all the circumstances required by the statute then in force (2 Geo. II., ch. 23), as it was a matter of evidence. So of late years it has been held at law that if non-delivery of a bill is not pleaded there may be a state of facts under which the attorney can recover without proving a bill : *Scarth v. Rutland*, L. R. 1 C. P., 642. I do not know what the facts may be as to the time of the delivery of the plaintiffs' bill of costs now in question, nor do I need to consider what the result will be if it has not been delivered a month before action. My opinion is, however, that now, as before the Judicature Act, the defendant must allege this as a ground of defence, unless it appears on the face of the statement of claim that a month has not elapsed : *Dawkins v. Lord Penrhyn*, L. R. 4 App., 51. This ground of demurrer is over-ruled.

During the argument I expressed my opinion that it was sufficiently shewn that what was complained of was the alienation of property with intent to defeat creditors or the plaintiffs as creditors. For creditors they are, though the right of action may be suspended pending the month from the delivery of the bill. The claim states a conveyance of the land, purporting to be for value, and alleges that it

was nevertheless without consideration, that the client has no other property out of which the plaintiffs can be paid, and that this was done long after the liability for the costs had been incurred. These statements if true indicate that a fraud has been committed, though the pleader does not set forth the intent in terms. In *Freeman v. Pope*, L. R. 5 Ch. 545, Giffard, L. J., says, "If at the date of the settlement the person making the settlement was not in a position actually to pay his creditors the law would infer that he intended, by making this voluntary settlement, to defeat and delay them."

The result is, that the demurrer fails on all points. But I cannot commend the plaintiffs' pleading, which is almost framed as if to invite a demurrer. I allow them to amend by suing on behalf of all creditors, and I allow the defendants to set up any defence they may have upon payment of \$10 costs within two weeks, and upon undertaking to go to trial at the approaching sittings. If this is not paid, judgment for the plaintiffs on the demurrer.

[CHANCERY DIVISION.]

GRANT V. DUNN ET AL.

Mechanics' Lien Act—Registration of claim by assignee—Affidavit of verification—R. S. C. ch. 120, sec. 4, sub-sec. 2.

Where G. claimed, under the Mechanics' Lien Act, a lien in respect of materials furnished, by virtue of an assignment from the original furnisher thereof :

Held, G. had a right to register a claim for the same under the said Act, but the affidavit of verification required by sec. 4, sub-sec. 2, must be made by himself, and not by the assignor.

THIS was an action to recover an alleged debt and also to enforce a mechanic's lien.

The lien in question was obtained in respect of certain carpentering material to the value of \$140.54, furnished by a certain firm of William Simpson & Co., on or about November 1st, 1882, to the defendant Elizabeth Dunn, to be used by her husband, the other defendant, in the erection of certain buildings upon the lands sought to be charged herein; and the plaintiff claimed under deeds of assignment from William Simpson and his partner, the other member of the said firm, bearing date December 2nd., 1882, and December 5th, 1882, respectively, whereby all the interest of the two partners in the partnership stock and assets of the said firm was assigned to him. The statement of claim set out the above facts, and alleged that on January 17th., 1883, the plaintiff, in pursuance of the Mechanic's Lien Act, and the Act amending the same, caused to be filed in the registry office of the City of Toronto a statement of his said claim: that the said statement was verified by an affidavit of William Simpson: that, on January 22nd., 1883, he caused the defendants to be notified in writing of his unpaid account and demand against the defendants for such material; and that he had filed a lien therefor; and the plaintiff claimed payment of the said sum of \$140.54, with interest and costs; or, in default, sale of the said lands.

The defendants demurred to such portions of the plaintiff's statement of claim as related to the said Mechanics Lien, on the ground that the plaintiff claiming in this action to recover as assignee had no right under the Mechanics Lien Act or any amendments thereof, to register any lien for materials furnished by his assignor, and was therefore not entitled to the relief sought in respect thereof.

The demurrer came on for argument on April 11th, 1883, before Proudfoot, J., and the demurrer, on the above grounds, was over-ruled.

The plaintiff then demurred *ore tenus*, on the ground that the affidavit verifying the registered claim was made by Simpson, not by the plaintiff, who was the person entitled to the lien, and who should have made the affidavit under R. S. O. ch. 120, sec. 4, sub-sec. 2.

A. McLean, for the demurrer.

G. McDonald, contra.

April 11, 1883.—PROUDFOOT, J.—I allow the demurrer on the ground that the affidavit ought to have been made by the lien holder, not by his assignor.

[COMMON PLEAS DIVISION.]

VICTORIA MUTUAL FIRE INSURANCE COMPANY V.
DAVIDSON, ET. AL.

*Principal and surety—Division Court Clerk—Special agreement for fees—
Discharge of sureties—Entries in books—Evidence.*

After the defendants had become sureties for a Division Court Clerk, a special arrangement was made between the plaintiffs and the clerk, under which the latter was to receive no costs but disbursements only in all suits entered with him by the plaintiffs in which nothing was realized, and he on his part guaranteed that the Court had jurisdiction. This was subsequently varied by giving to the clerk fifty cents in addition to the disbursements in such suits. Periodical statements were made from time to time according to the agreement, and a cheque given for the balance thus shewn. It was afterwards discovered that the statements were incorrect, and that moneys collected by the clerk had not been paid over.

Held, that the special arrangement made with the clerk discharged the sureties.

Held, also, that the periodical statements were not conclusive as against the plaintiffs.

The cases deciding that entries in the books of an officer are evidence in his lifetime against sureties questioned.

THIS was an action against the defendant William Davidson, a Division Court clerk, and the other defendants, Robert Hunter and John Stewart, Jr., his sureties, upon a covenant alleged to have been entered into on the 5th April, 1880.

The cause was tried before Burton, J. A., without a jury, at Hamilton, at the Spring Assizes of 1883.

The facts are fully stated in the judgment hereunder of the learned Judge at the trial.

Osler, Q. C., and Walker, for the plaintiffs.

Furlong and Nesbitt for the defendants.

May, 16, 1883. BURTON, J. A.—This is an action against the Clerk of a Division Court and his sureties upon a covenant alleged to have been entered into on the 5th April, 1880.

The bond or covenant itself, which should have been

among the records in the office of the Clerk of the Peace, was not forthcoming, and it was alleged by one of the sureties, and also by Gibson, formerly in the office of the Clerk of the Peace, that it was executed at an earlier date, either in December or January previously, a fact of some importance, inasmuch as in the month of March, 1880, an Act was passed materially increasing the jurisdiction of the Court and making other changes, which would probably have relieved the sureties from liability for anything after that period; but the learned County Court Judge, who was called as a witness, refers to that as fixing the time upon his memory. He says he then requested all the clerks to give security for an increased amount, and desired such new security to be given within thirty days, and that this covenant was completed a day or two after the prescribed period. I hold therefore, that it is established in evidence that the bond was executed on the 5th April, 1880.

I have consequently no difficulty as regards the principal defendant in making a decree referring it to the Deputy Clerk of the Crown at Hamilton to take an account of the moneys which, prior to the commencement of this action, have come into the hands of him, the said Davidson, and which he has not paid ~~over~~ or accounted for to the plaintiffs.

As to the sureties, there is more difficulty. It is urged on their behalf, that by the plaintiffs' course of dealing with the defendant Davidson they were released.

The secretary of the plaintiffs, the company, was examined, and admitted that since the year 1880, and during the time the moneys now sought to be recovered were collected, a special arrangement existed between the company and the clerk, under which it was agreed that the clerk should receive no costs, but disbursements only, in all suits in which nothing should be realized, and he guaranteed in all cases that the Court had jurisdiction. This arrangement was the first one made, and was prior to 1880, and in that year was subsequently varied by giving to the

clerk 50cts., besides disbursements in all such suits. He explained that by disbursements was understood every thing which the clerk had to pay out.

It was further arranged that the clerk should render periodical statements. These statements were rendered from time to time, and a cheque given for the apparent balance shewn by them, and purporting to be for balance thus shewn.

After the clerk's resignation it was found that a number of the items shewn in these accounts were incorrect.

It is claimed that these settlements were conclusive, but I hold otherwise: they are *prima facie* evidence of an account stated; and it being now shewn that in several cases the money had been received and not paid over, (whilst the costs are charged), by entries in the official book, in the hand-writing of the clerk, I have to consider.

1st. Whether there is any evidence, as against the sureties, of the receipt of these moneys.

2nd. Whether the agreement shewn affords any defence.

I referred the counsel at the trial to a case which I had in my mind at the time, of *Ferrie v. Jones*, 8 U. C. R. 791, which I thought, unless overruled, was decisive of the first point, and I have referred to it since and find that it supports the impression which I had formed; and although one's confidence in the decision is a good deal weakened from the fact that Sir John Robinson dissented, it would be nevertheless binding upon me, even if I also dissented from it, unless overruled in subsequent cases.

I incline to think that the admissions made by the principal, even when made in the ordinary course of business, and by a person filling a position as a public officer, though good evidence as against himself, are only evidence against the surety when the death of the principal is shewn. That the general rule is, that no evidence shall be given against a person when it is not given under the sanction of an oath, or its equivalent, and that the person proving it or whose statements profess to prove it, should be subject to the ordeal of a cross-examination by the party against whom he is called.

There are certain exceptions to this rule, but in my humble judgment this is not within them.

I think the evidence is not sufficient to charge the sureties, on the short ground that a principal, as such, is not the agent of his sureties for the purpose of making admissions as to the matter for which the surety gives security.

The only evidence given here is, that certain entries, presumably in the hand-writing of the clerk, in the books of the office, shew the receipt of certain moneys to which the plaintiffs were entitled, and the secretary proves that they were never paid over.

I have been unable to find any thing beyond the dictum of the late Chief Justice, Sir John Robinson, entitled, I am free to say, to the highest respect—to warrant the extension of the rule to cases in which the party making the entry is still living, with the exception of *Middlefield v. Gould*, 10 C. P. 9, in which a judgment of the Court of Common Pleas holds that entries of this nature in a *quasi* public book are admissible against the sureties.

But with very great deference to the learned Judge who delivered the judgment of the Court on that occasion, I am of opinion that the case of *Goss v. Watlington*, 3 B. & B. 132, upon which he mainly relied, is no authority for that position. The bond in that case was conditioned, not only for the payment of all moneys received, but also that *the principal should from time to time enter in certain books all moneys received by him*; but, even in that case, the evidence was offered after the death of the principal. Bayley, J., in commenting upon it in *Whitnash v. George*, 8 B. & C. 556, 560, said: "The entries were evidence against the surety, because they were *made by the collector in pursuance of the stipulation contained in the condition of the bond.*"

Sitting here I bow to the authority of that case, although I may be allowed without disrespect to say that I question its correctness, but treating it as binding upon me, I am driven to consider the other questions raised.

What is contended on the part of the sureties is, that the fees to which the clerk was entitled having been altered by arrangement between him and the plaintiffs, without the consent of the sureties, and the clerk having been relieved from the ordinary liability, by the agreement to accept periodical accounts, and having assumed a further liability to guarantee the plaintiffs against the consequences of any cases being beyond the jurisdiction of the Court, such a material change was by agreement made in the nature and duties of the office as to relieve them from liability.

The counsel for the plaintiffs, on the other hand, contends that none of the matters embraced in the present claim come within the agreement, and that to be available as a defence they were bound to shew that the agreement was tainted with maintenance: that in the *Pybus* claim the jurisdiction was not only extended, but that there was a radical change in the nature and duties of the office. That there was nothing morally wrong in such an agreement, and that apart from the agreement the clerk might have waived his fees, or made any disposition of them that he pleased. He referred to the *Bank of Toronto v. Wilmot*, 19 U. C. R. 73, to shew that the mere alteration in the mode of remuneration would not affect the sureties.

It may be a nice question how far that alone would afford any defence, and it was urged that the rendering of periodical accounts did not relieve the clerk from sending notice through the post office of the receipt of moneys as provided for by sec. 56 of the Act of 1880, and that is possibly so; but could the sureties have insisted on the payment of the amount so received before the expiry of the credit, so to speak, during which these accounts were running or until the time when the plaintiffs could call for their delivery. As at present advised I think they could not, and this in itself was such an interference with the rights of the sureties as to operate as a discharge.

If the Legislature had interfered after the bond was given, and enacted that instead of paying over on receipt, the

clerk should only be required to do so when he rendered his accounts every three months, could there be the slightest doubt that the surety would be relieved ; and if in addition they had provided that every clerk was bound at his own risk to assume the responsibility of the Court having jurisdiction in every case which the litigants desired to have placed in suit, would it not be imposing upon the clerk a collateral liability which could never have been in the contemplation of the sureties, and materially affecting it may be the solvency of the principal ?

If in place of the Legislature making these alterations, the plaintiffs and the principal do so without the consent of the sureties, the same consequences must, I think, follow.

I think I am bound, as regards the sureties, to give judgment in their favour, and of course with costs.

I have, since preparing this memorandum of my judgment, been furnished by Mr. Osler with some further authorities which I have examined, but they do not induce me to vary my decision. The first of them is the case of *Webster v. Petre*, 4 Ex. D. 127. There the plaintiff was liable upon a bond which he had given to the Crown, and, but for the passage subsequently of an Act which enabled him to apply to have it cancelled upon terms, would have been liable for the full amount. Under that Act he got rid of his liability on payment of a smaller sum, but the indemnity given to him by the defendant extended to all liability under the bond, and having paid this smaller sum, the Court held that he was entitled to be indemnified.

In the case of the *York City and County Banking Co. v. Baimbridge*, 43 L. T. N. S. 732, the learned Judge held that both the parties to the note there sued on were liable to the bank as principals, although sureties as between each other, but that even assuming that the relation of principal and surety existed, there was no binding agreement to give time, and although the interest was increased the bank could have sued at any time.

In *Pattison v. Guardians of Belford Union*, 1 H. & N. 523, the sole question was, whether sums for which the

treasurer (the principal debtor in that case) had received credit in his accounts with the overseers for corn sold them, were not in effect payments to him for the rates for which they were liable, that it was needless for the treasurer to go through the idle ceremony of handing to the overseers the moneys for corn sold to the treasurer and then receiving it back again for the rates.

These do not appear to me to affect the question raised in this action, and I retain the opinion I have above expressed.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

CARTWRIGHT V. JOHN HINDS AND MARY HINDS.

Ca. sa.—*Power of Divisional Court to review action of Judge—Misleading statements in affidavits—Residence.*

Held, that a Divisional Court may review the action of a Judge in setting aside a writ of *ca. sa.* and the arrest thereunder, and also his action in making the order to arrest.

Held, also, on the evidence, set out below, that the defendant could properly be treated as a resident of this Province.

Held, also, that a statement in the affidavit on which the order to arrest was founded, that the defendant had made "an assignment of all his property," without adding for the general benefit of all his creditors, was of itself objectionable, as leading to the belief that the assignment was fraudulent, but apart from this there was sufficient stated to justify the issue of the order.

MOTION, on behalf of the plaintiff, to rescind the order of Mr. Justice Galt, made on the 8th of February, 1883, setting aside the writ of *ca. sa.* issued against the defendant John Hinds, and his arrest thereon; and motion on behalf of the said defendant, in case the order of Mr. Justice Galt be set aside, that the original order of the same learned Judge of the 2nd of February, for the issue of a *ca. sa.* against the defendant, be set aside for the reasons in the notice of motion mentioned. Both motions came on together.

The facts were, that on the 24th of January, 1883, the plaintiff recovered judgment against the defendants, being mother and son, for the sum of \$5,036.25 exclusive of costs. On the 25th of the same month a *feri facias* against goods issued on the judgment, and was delivered to the sheriff of Frontenac. On the last named day an appointment was executed by the Judge of the County Court of Frontenac for the examination of the defendant John Hinds as to his property under Rule 366 of the Judicature Act. On the same day the person who had a copy of the appointment proceeded to the residence of the defendant in Kingston, and was informed he had just left the city. On the 27th of the same month the defendant was personally served with a copy of the appointment in the city of Toronto, and was there paid \$7 for his conduct money and fees. The day appointed for the examination was the 31st of January, at 11 o'clock in the forenoon, at the County Court Judge's Chambers in the city of Kingston. The County Court Judge certified that he attended at the time and place appointed for the examination of the defendant, and that the plaintiff and counsel also so attended; but the defendant did not attend, nor did he allege any excuse for not attending, nor did any one appear for him, nor was any excuse alleged for his non-attendance. The sheriff of Frontenac informed Mr. Machar, the partner of Mr. Bawden, the plaintiff's solicitor, and Mr. Machar also believed that the said defendant had no goods in the county of Frontenac; and the sheriff further said if he were then required to return the said *feri facias*, he would have to return it *nulla bona*. The defendants resided at Kingston at the time of the recovery of the judgment, and for upwards of two months previously, but John Hinds left Kingston by the first west bound train after the making of the said appointment, stating he was going to Manitoba, and having previously to the issue of the *feri facias*, and about the 3rd of the said month of January, executed a deed purporting to be an assignment of all his property. At the time John Hinds was served with the copy of

appointment, he said to the person who was about to serve it, "you want to serve me?" The person said "yes," and John Hinds turned away with a laugh, saying, "all right," And his name was then entered on the Hotel register, "John Hinds, Winnipeg."

There was, besides the above facts, the affidavit of the plaintiff, stating he had good and probable cause for believing, and he verily believed the defendant John Hinds, unless forthwith apprehended, was about to quit Ontario, with intent to defraud his creditors generally.

It was upon these facts the learned Judge made the order on the 2nd of February, for the issue of the *ca. sa.*

The following affidavits and papers were filed by the defendant John Hinds, on applying to set aside his arrest and the *ca. sa.* The defendant described himself as of the city of Winnipeg. He said that in 1880, he, the defendant, took up land in Manitoba, and entered his name for a homestead there in 1881, and he had built a house and worked the farm and cultivated it: that he returned to Kingston on a visit to his mother on the 1st of January last, and having become involved from land transactions and otherwise he made an assignment of all his estate and effects for the benefit of his creditors. He was unwell in Kingston when he arrived there, and as soon as he was able to travel he started for Manitoba, but on reaching Toronto he became too ill to proceed further. While in Toronto he was served with the appointment for his examination at Kingston. He resolved to obey the appointment, but on the evening of the 30th of January he was too ill to travel. He sent a telegram to Mr. Macdonnell, solicitor, of Kingston. He handed the telegram to a friend to send for him on the evening of the 30th, and he only learned on the 4th of February, that Mr. Macdonnell had not received it. He heard nothing further of the matter until he was arrested. He had no knowledge of the order for his examination when he left Kingston. He had no desire to evade the examination. He considered himself bound to obey it. He was not quitting Ontario

with the intent to defraud his creditors. He was going to meet his creditors, he having several there for larger amounts, and he intended to do his utmost to realize his property there for the benefit of his creditors. His intention of returning to Manitoba was not concealed by him, but was well-known to his creditors, one of whom, Mr. Fraser, of Kingston, banker, to whom he owes \$3,500, fully concurred in his plans in doing so.

The co-defendant, who is the mother of John Hinds, and his brother-in-law Lieutenant-Colonel Oliver of the Royal Artillery, made an affidavit also to the fact of John Hinds having gone to Manitoba at the time he said, and of his residing there since then, excepting that he made occasional visits to his mother at Kingston, and on business, for a few days at a time.

Mary Hinds also said that she heard Mr. Fraser on the 13th January, when her son proposed to return to Manitoba to assist in making the best disposition of his estate for the benefit of his creditors, say he thought it was the best thing he could do.

Mr. Macdonnell, solicitor of Kingston, made affidavit also of John Hinds having made the assignment for the benefit of his creditors, on the 3rd of January: that he knew John Hinds was returning to Manitoba, and he considered it the best thing he could do in the interest of his creditors. He had no reason to believe that John Hinds knew when he left Kingston that there was an intention of examining him, or that he left Kingston to evade examination, and he had no reason to believe John Hinds intended to quit Ontario, with intent to defraud his creditors.

The deed of assignment was also put in. It was an assignment by John Hinds, described as of Winnipeg, of several parcels of land in Manitoba, and a parcel of land on King street in Kingston, and all his personal estate, which was represented to be all his estate.

Mr. Machar, who made an affidavit for the plaintiff, was cross-examined upon it by the defendant John Hinds. He

said his belief as to John Hinds's residence being in Ontario was that he had seen him coming and going from the plaintiff's office for about two months commencing in November last. He made no enquiry as to the said defendant's residence. He knew the said defendant had been living in Manitoba, but not during these two months. He had heard from the plaintiff that John Hinds had a farm in Manitoba. He did not state in his affidavit that the assignment was for the benefit of creditors, because an "assignment" often implies that it is for creditors generally, and besides he had an idea of attacking the assignment, and he wanted to shew that the reason why no goods could be reached was that an assignment had been made. He thought it likely John Hinds had left Kingston to avoid an examination, for Mr. G. M. Macdonnell was present about the time the appointment was made. He thought John Hinds had been in Kingston for the said two months, because among other reasons he was described as of Kingston, and because he was described as of Kingston in a bill of sale of a druggist's stock on the 6th of January, 1883. He knew he was described in the assignment as of "Winnipeg," and in the mortgage to Mr. Fraser in the like manner.

The following affidavits and papers were filed by the plaintiff in answer to the application of John Hinds.

The plaintiff said he was induced to advance to John Hinds the amount of the promissory note for which he recovered judgment on or about the 28th November, 1882, on his representation that his total liabilities did not exceed \$8000: that he had large sums of money to pay off all his debts, including this note, presently available at Winnipeg; and that he had lands and other valuable property far exceeding in value the whole of his indebtedness, and that he desired from the plaintiff only a temporary accommodation for a month: that the deponent was informed by Mr. Fraser, banker, of Kingston, one of the creditors of the said defendant, that the defendant about the 23rd of November, made a statement shewing assets to the amount of \$90,000,

and liabilities to the amount of \$9,000: that in about five weeks after the said defendant made an assignment of part of his said properties, and made a statement shewing his assets to be about \$45,000, and liabilities upwards of \$38,000: that the said defendant had refused and evaded all explanation of the discrepancies between these statements: that the said defendant obtained the loan from the plaintiff for the purpose as he alleged of enabling him to remain in Kingston instead of proceeding to Winnipeg. The loan was negotiated and made payable, and matured at Kingston, and the said defendant resided at the time of the loan and its maturity where he had been carrying on business, which he continued to carry on until his assignment, and he resided in Kingston from the time of the assignment (the 3rd of January) until his departure (on the 25th of January.)

The plaintiff also made another affidavit that from the nature of the assets in the assignment, which consist largely of unproductive property heavily encumbered, he did not think it possible more than a very small proportion of the nominal value put upon them by the said defendant could be realized after payment of the mortgages: that the deponent told Macdonnell, the solicitor of the said defendant, that it was of the greatest importance the said defendant should be examined as to the disposition of the estate, and that Macdonnell concurred in such examination being had; and he also told Colonel Oliver, the brother-in-law of the said defendant, it was the desire of the creditors to examine the said defendant: that the claim against Bethell, stated in the defendant's assets at \$6,000, had been disposed of for \$2,700, and the residue was of no value.

Mr. Shibley said on the 25th of January he had an appointment for the examination of John Hinds, not only on behalf of the plaintiff but on behalf also of the Merchants' Bank, but that he was informed the defendant had just left Kingston when the deponent proceeded to the house of the defendant to make service.

Mr. Machar, on the 5th of February, made affidavit that

in a bill of sale of chattels for the benefit of creditors made by John Hinds to Mr. Macdonnell, the trustee under the deed of assignment, and for the like purposes of the assignment, Hinds was therein described as of the city of Kingston, and he was also in like manner described in a mortgage given by him on the 23rd of November, 1882, (to Donald Fraser) and that the said Hinds was the owner of the business carried on in Kingston by Bethell, who merely managed the business for the said Hinds at a salary. And on the 7th of February, Machar made affidavit that an additional reason why he had described Hinds as residing in Kingston in his original affidavit for the arrest of the said Hinds was, that the plaintiff had informed him he the plaintiff had made the loan to the said Hinds in order that he might remain in Kingston.

Mr. Hague, the manager of the Merchants' Bank at Kingston, said, in July, 1882, the defendant got a loan from that bank of \$4,000 on representations that the properties he named were worth (a sum by computation amounting to \$64,000) on a part of which only a trifling instalment was due, and that he reminded the said Hinds of that a few days ago, and also that but for such representations the loan would not have been made, and the bank have now a judgment for upwards of \$6,000, including the advance against the said Hinds.

Mr. Macdonnell, who acted for the said Hinds and the trustee of his estate, was examined before the deputy clerk of the Crown. He said the plaintiff told him of his intention to examine the said Hinds; he could not recall a distinct statement in words, but the deponent had a perfect understanding that it was the plaintiff's desire to examine the said Hinds. There was much more that need not be stated.

Mr. Fraser was examined before the Judge of the County Court at Kingston, for the plaintiff. He produced the statement John Hinds made to him on the 23rd of November, 1882; he shewed it to the plaintiff; he took a mortgage on that day from Hinds for \$2,500 on his King street property in Kingston.

The statement shewed assets above all incumbrances \$61,640, and liabilities \$9,000.

On the 8th of February the learned Judge made the order moved against, setting aside the writ of *ca. sa.* and the arrest thereunder.

At the Easter Sittings of the Court, May 29th, 1883, *Aylesworth*, and *Machar* of Kingston, supported the plaintiff's motion, and shewed cause to the defendant's. The plaintiff appealed from the order of Mr. Justice Galt setting aside the *ca. sa.* and arrest thereon. A Judge has no power to set aside such writ, although he may set aside a *capias* before judgment: R. S. O. ch. 50, sec. 36; *Kidd v. O'Connor*, 43 U. C. R. 193. The objection that one of the affidavits stated generally that John Hinds made an assignment of his property without stating that it was for the benefit of his creditors, and which it is said led the learned Judge to think it was a fraudulent or preferential assignment in favour of one or more creditors only, has been explained in the affidavits filed and was not intended to conceal the truth. The objections taken by the defendant were: (1) That the defendant was required to be examined out of his own county. Assuming that to be true, it is no objection: *Switzer v. Brown*, 20 C. P. 193. (2) That he was not paid sufficient conduct money. He was paid \$7, being more than sufficient to take him from Toronto, where he was served, to Kingston where he was to be examined, and which \$7 he has not returned although he did not attend to be examined. (3) That the defendant was not about to leave Ontario with intent to defraud his creditors. He was going to leave this Province, but it is said he was going to his home in Manitoba, and which had been his home for more than two years before that. It was shewn that on the 23rd of November, 1882, in a mortgage he gave to Mr. Fraser, he is described as of the city of Kingston. In the assignment made for creditors on the 3rd of January, 1883, he is described as of the city of Winnipeg; and in a bill of sale of his chattels made for

the like purpose on the 6th of January, he is described as of the city of Kingston. The defendant was brought up and was a resident of Kingston until lately, and he has no home unless it is at his mother's residence in Kingston. The defendant delivered a statement of his affairs to Mr. Fraser, from whom he obtained a loan of \$2,500. The statement shewed that the defendant was worth in property about \$60,000 clear of all encumbrances, and that he owed only about \$9,000, and the statement was shewn to the plaintiff, and upon the like representations made by the defendant to the plaintiff he obtained about the same time from the plaintiff the sum of \$5,000. And very shortly after that he assigned all his estate as he said to his creditors, and in a statement accompanying it he stated his assets exceeded his liabilities by about \$6,000 only. If the defendant was leaving the Province the Judge will not enquire why he was leaving it, whether with intent to defraud or not. The application to arrest defendant was as well for not attending to be examined as because he was wrongfully leaving the Province : R. S. O. ch. 67, sec. 7, and ch. 50, sec. 305.

MacLennan, Q. C., contra. The Judge had power to set aside the writ and arrest: *Day v. Vincent*, 12 W. R. 281. The order to arrest cannot be supported on the ground that the defendant did not attend to be examined, as he should have been required to shew cause why he did not attend before he could be arrested. An *ex parte* order must always be based upon perfect good faith, every fact material must be stated to the Court or Judge, and if there be any concealment or even innocent non-statement of material facts, the order will be set aside. That is the practice in applying for an *ex parte* injunction, and the like rule applies on a motion to have the debtor arrested. At the time the affidavits were made on which to apply for an order to arrest, it was known to all the parties the defendant had made an assignment for the benefit of his creditors generally, and that assignment was referred to in such a

way that it led the learned Judge to believe the assignment was made to defraud creditors. It was also well known the defendant had lived in Manitoba for some very considerable time, and that, too, was not stated to the Judge, and it is of no consequence these matters were not communicated to the Judge free from all bad motives, nor that the party did not think they were proper to be stated. The Judge had power also to enquire into the merits of the case: *Shaw v. McKenzie*, 6 Sup. Ct. 181; *Abouloff v. Oppenheimer*, 10 Q. B. D. 295; *Ley v. McDonald*, 2 Gr. 398; *McMaster v. Callaway*, 6 Gr. 577; *Kerr on Injunctions*, 2nd ed., 562; *Joice on Injunctions*, (ed. 1872) 1034. If the proceedings remain as they are, the motion to set aside the Judge's order to arrest is not asked; but if any change is made in the proceedings, then the motion to rescind the order to arrest is pressed.

Aylesworth, in reply, referred to *Shaw v. Nickerson*, 7 U. C. R. 541.

June 29, 1883. WILSON, C. J.—I am of opinion the Court may review the action of the learned Judge in setting aside the writ and arrest, and I think also his action in making the order to arrest may be reviewed: *Imlay v. Ellefson*, 2 East 453; *Talbut v. Bulkeley*, 16 M. & W. 193; *Kidd v. O'Connor*, 43 U. C. R. 193, 198, and all the cases reviewed in *Damer v. Busby*, 5 P. R. 356, 386.

It is observable that while an express appeal is given in cases of arrest before judgment—R. S. O. ch. 50, sec. 36—no such provision is made in cases of arrest after judgment by R. S. O. ch. 67, sec. 7, nor is any given by ch. 50, sec. 305 when the defendant does not appear to be examined, or does not answer satisfactorily; but in the last case the Court or a Judge may act, while under ch. 67, sec. 7, it is only the Judge who is to be satisfied.

The next enquiry arises under R. S. O. ch. 67, sec. 7, the enactment under which the arrest was made.

It is said the affidavit was untrue, and the arrest was procured by an abuse of the process of the Court, because

among other things it stated "the defendants were and resided at the city of Kingston at the time of the recovery of the judgment, and for upwards of two months previously, but the defendant John Hinds left the city of Kingston by the first west bound train after the making of the annexed appointment, stating he was going to Manitoba, and having previously to the execution of the *fieri facias* against goods, and on or about the 3rd day of January last, executed a deed purporting to be an assignment of all his property; and he did not attend, nor has he alleged any excuse for not attending at the time and place named in and pursuant to the said appointment;" and it is alleged that John Hinds was not a resident of this Province at the time in question: that he had about two years before then taken up a homestead in Manitoba, and had become for that length of time a resident there, and that he was not about to quit Ontario with intent to defraud his creditors, but was merely going to his home in Manitoba; and that the assignment he made was for the benefit of his creditors generally, and he did not evade his examination referred to.

The first point is, whether John Hinds could properly be treated as a resident of this Province. His residence was, so far as we know, in Kingston before he left for Manitoba about two years ago, after that it was in Manitoba, but he returned to Kingston several times in the year, on visits and on business. According to his mother's diary he was in Kingston in 1881, from the 8th of March till the 7th of April; from the 22nd of July till the 10th of August; and from the 25th of October till the 23rd of November, or about the 1st of December, or about one-fourth of his time. In 1882, he was in Kingston only three days in July, and from the 10th to the 30th of November; and in 1883, from the 1st of January until his arrest. He is not a married man. He had a drug business in Kingston which he carried on all the time he was at the west, and which he disposed of about the end of last year, and he described himself in a mortgage on the 23rd of November, 1882, and in a bill of sale of his goods on the 6th of January, 1883,

as of the city of Kingston, although in the assignment of the 3rd of January he describes himself as of the city of Winnipeg. He also told the plaintiff when he was procuring the loan from him that it was "for the purpose of enabling him to remain in Kingston instead of proceeding to Winnipeg," in which country, according to his own account, he had not been at all successful.

There is certainly no evidence of a change of domicile, but that is different from a change of residence. I think John Hinds from his western residence might be required to give security for costs, but not if his absence were temporary, nor if he had sufficient property here to answer the costs. That however is not altogether an exact test

The question here properly upon the facts is: As the defendant has described himself in the two documents referred to as of the city of Kingston, and as his domicile is there, and as he borrowed the money from the plaintiff to enable him to remain in Kingston instead of proceeding to Manitoba, and so told the plaintiff, can he complain of the plaintiff for treating him as a resident of Ontario? I think he cannot. A person may have more than one residence: *Walcot v. Botfield*, Kay 534, 18 Jur 570. But as a general rule he cannot have two domiciles: *Forbes v. Forbes*, Kay 341, 18 Jur. 642. There are later cases also on the subject.

John Hinds could therefore be treated as a resident of the Province, and as a person capable of quitting it with intent to defraud his creditors. The question of *such intent* is the next enquiry.

It appears to me the *intent* may be enquired into, otherwise the most serious wrong might be done, while the law was designed merely to punish fraud. The circumstances might be of the most suspicious nature, yet capable of the simplest and most satisfactory explanation: *Edsdaile v. Visser*, 13 Ch. D. 421; *Chard v. Jervis*, 9 Q. B. D. 178; *Stewart v. Waugh*, 33 L. J. Q. B. 86.

In this case judgment was entered for the plaintiff on the 24th of January. The day following an appointment

was obtained in this case, as well as on the judgment of the Merchants' Bank against John Hinds, for his examination as to his property, and I have no kind of doubt that through his solicitor Mr. Macdonnell, or through his brother-in-law Colonel Oliver, both of whom knew the plaintiff intended to examine the defendant, he the defendant knew of such appointment and left Kingston purposely to avoid service, and to avoid an examination. The representation he had made to the Merchants' Bank and to the plaintiff by means of which he procured a loan of \$4,000 from the bank and of \$5,000 from the plaintiff, he may have thought, and thought correctly, could not if true, as I assume them to be, bear investigation. The assertion he now makes that he was all along desirous of obeying the order, yet doing nothing to shew an obedience of it, is a mere pretence, for he did nothing until the evening of the 30th, when at Toronto he gave a telegram to a friend to send to his solicitor Mr. Macdonnell at Kingston, which telegram, if sent, never reached its destination, nor did he take the trouble to write or explain to any one why he did not attend, nor did he go to Kingston or offer to submit at any time to an examination when the day for examination had gone by.

That much of the case is manifestly true, and is evidence of a fraudulent intent.

The other ground of fraudulent intent stated in the original affidavit is, that the defendant had made "an assignment of all his property" without adding *for the general benefit of his creditors*, which certainly should have been done, because the learned Judge who granted the order to arrest was induced thereby to believe that it was a fraudulent or preferential assignment for some favoured creditors and not for creditors generally.

If the full facts had been stated, as they might have been, for they were then known both to the plaintiff and to his solicitor, they would have been somewhat as follows: "That on the 23rd of November, 1882, the defendant John Hinds gave to Mr. Fraser, banker of Kingston, a memorandum of property he alleged he owned, shewing a clear surplus

above all liabilities of about \$50,000, and which statement Mr. Fraser shewed to the plaintiff and it was believed by him to be correct, and the defendant made the like representations to the plaintiff, and upon the faith of such statement and representations the plaintiff at the request of the defendant lent him the sum of \$5,000: that the deed of assignment did not convey to the trustee *all the estate* of the defendant as it purported to do, but omitted from it (describing such omissions and stating why it was believed such omissions were made) and that he had refused to explain such discrepancies, and that the estate assigned was not worth more than about \$6,000 above the liabilities, and it was not believed it would pay the debts of the defendant."

The fact then is, when all the circumstances become known the defendant's position is not bettered, but is made much worse than it appeared before, on account of such omissions and misstatement of his assets and liabilities, and his refusal to explain them or submit to an examination respecting them.

It is true the defendant swears he assigned *all* his estate and effects, but he does not answer the charge against him denying the truth of that statement. The learned Judge, I think, remained under the impression that the assignment really did cover the whole of the defendant's estate and effects. Although, however, the defendant's case is not bettered by the discovery of the full facts, the question is, should the plaintiff in his application have disclosed them for the information of the Judge? I think he should.

In my opinion striking out that part of the affidavit relating to the assignment, there was enough to satisfy the learned Judge that the writ should be issued. But as it stands now, what is the defendant's position? He has, in attempting to fasten a concealment or insufficient and misleading statement upon the plaintiff, misrepresented the effect of the deed he puts forward in his defence. He is not in a favourable position before the Court, and the

learned Judge might for that cause, as well as because he has taken advantage of the order, have restrained him from bringing an action: *Haywood v. Duff*, 5 C. B. N. S. 364.

The plaintiff has no desire to press his writ against the defendant; he claims only to be protected against an action at the suit of the defendant for the arrest which was made. The order will therefore be absolute, setting aside the order of Mr. Justice Galt which set aside the writ of *capias ad satisfaciendum* issued in this cause.

OSLER, J., and GALT, J., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

WALLACE V. HUTCHISON.

Married woman—Separate estate—Right to dower—Judgment.

In an action against a married woman, married in 1871, on a promissory note made by her, the only property she was proved to have was a right to dower in certain land owned by a former husband. Judgment was entered for the plaintiff for the amount of his claim, with a direction for the recovery of same out of the separate property then and at the date of the making of the note vested in defendant, or in any person in trust for her, with which amount such separate estate was charged.

ACTION against the defendant, Mary Ann Hutchison, on a promissory note for \$388.09, dated 28th of February, 1881, by the payee against the maker, payable in three months. Interest was claimed at ten per cent. till judgment.

The defence was, that the defendant at the time of the making of the note was and still is a married woman.

The plaintiff replied that at the time of contracting the debt for which the note was given the defendant had and still has real estate in Ontario, and that she contracted the

debt and made the note in reference to and to make her separate estate liable to be sold to pay the note if not paid at maturity, and the payee took the note from her relying upon the security of her separate estate to pay it. Issue.

The action was tried before Galt, J., without a jury, at Walkerton, at the Spring Assizes of 1883.

The evidence shewed the defendant was before her present marriage the widow of Neil McPhail. She had an interest in the farm of her former husband McPhail.

The payee said: "I gave the defendant up other notes I had paid for her, and I had lent her sums at different times, and I put them into this one note. A good deal of it was given while she was a widow. She said she got the money on her own account. I gave it to her because she was a widow, and because she had an interest in lot 10, in concession 4, of Saugeen. She said she would make it all right, and pay it. She left me all the papers she had in connection with that lot. She said they would be safe with me, and because I had given her money from time to time to purchase things for her children. When I came to get the money she said I had better try and get the money out of that. She told me her present husband did not know of her getting the goods and money from me. When she could not raise money on the papers, she said she was expecting money from Australia, and she would pay me when she got that money. She said that, too, when she signed the note. I said I put no value upon that affair in Australia. I did not promise to wait until she got that money from Australia. McPhail left infant children, and I knew the lot left could not be available for my debt until the children came of age, without going through Chancery. I was doubtful of the Australia money, as she had told me so many stories about it. It was a long time after she got the money and goods from me that I knew her husband was aware of it. Part of the debt was incurred in the lifetime of McPhail, and part while she was a widow. She must have got \$80 or \$100 before she married her present husband."

The defendant in her examination before the trial said she was married in November, 1871. Her first husband did not make a will. She had her dower in the land. She had property in Australia. She did not know what it was. The debt was incurred on the faith of the property there, and the debt was not to be paid until the money came from Australia.

The learned Judge found the only property the defendant had at the time of her present marriage was a right of dower in the land before mentioned, and that she was married in 1871; and he directed that the plaintiff recover out of the separate property of the defendant, which was at the date of the promissory note, and is at the present date vested in her, or in any other person in trust for her, the sum of \$472, with which sum the said separate property is hereby charged.

At the Easter Sittings of the Court, *Osler*, Q.C., moved on notice to set aside the judgment directed to be entered for the plaintiff, and to enter it for the defendant with costs, or to dismiss the action with costs, for that the judgment was wrong, as the defendant was a married woman when the note sued on was given, and was not possessed of separate estate in respect of which she could be deemed to have contracted.

During the same sittings, May 29, 1883, *Osler*, Q.C., supported the motion. The defendant has a right to dower, but it has not been assigned to her, and she cannot dispose of it without the consent of her husband. It is not, therefore, separate estate, and she has no other property. She said she had property in Australia, and that she was not to pay the debt until the money for that property was received by her, and it has not been received. The debt was contracted on the faith of the Australia property, and not on the farm lot. The farm lot therefore is not in any event chargeable with the debt. He referred to *McAnnany v. Turnbull*, 10 Gr. 298; *Allan v. Edinburgh Life Assurance Co.*, 19 Gr. 248, 25 Gr. 306; *Standard Bank v. Boulton*, 3 App. R. 93, at p. 99.

Rose, Q.C., shewed cause. The case of *Allan v. Edinburgh Life Ass. Co.*, 19 Gr. 298, 25 Gr. 306, shews that the wife's right to dower is saleable under execution. And in *Field v. McArthur*, 27 C. P. 15, the Court held that the test of whether the property was separate estate or not depended on the fact of whether it could be seized under an execution, and in *Lawson v. Laidlaw*, 3 App. R. 77, at p. 85, the same rule is laid down. The husband is in effect a trustee for his wife as to her property. Under the Act of 1873, 36 Vic. ch. 18, sec. 4, O., the husband's consent may be dispensed with, if the wife alienate her property.

Osler, Q.C., in reply, cited *Williams v. Reynolds*, 25 Gr. 49.

June 29, 1883. WILSON, C. J.—It is not necessary to discuss the Acts relating to married women and their property; it is sufficient to say that the right to dower which the defendant had, she still has, so far as that is material, if it can be made liable for the debt found against her. It is all the property she ever had, or has in this country. The Australian expectation the plaintiff did not rely upon, I think, as the fund from which he was to be paid. But the defendant not knowing where it is, nor what it is, nor the extent of it, nor the value of it, seems to think it the most suitable source of payment for a creditor, and that the plaintiff should wait for payment of his debt until the money arrives.

We think the plaintiff should be at liberty to enforce such remedy as he has, for it is all he can do, against the right to dower, and that he should not be delayed until the foreign property, if there be such a property, is realized, for we do not think he agreed to look to that fund or expectation for payment.

The motion will be dismissed, with costs.

GALT, J., concurred.

OSLER, J., was absent when judgment was delivered, being engaged at the York Summer Assizes.

Motion dismissed.

[COMMON PLEAS DIVISION.]

REGINA V. GOUGH.

Criminal law—Indictment—Pleading—Omission of “feloniously.”

In an indictment purporting to be under 32 & 33 Vic. ch. 22, sec. 45, D., for malicious injury to property, the word “feloniously” was omitted: *Held*, bad, and ordered to be quashed.

THE prisoner was indicted at Kingston in March last, at the Court of Oyer and Terminer, &c. The indictment purported to be under the 32 & 33 Vict. ch. 22, sec. 45, for that he did unlawfully and maliciously maim and wound by shooting them, two horses, the property of Charles Hysop, contrary to the statute. The accused demurred, and the Crown Counsel joined in demurrer.

The cause was not disposed of at that Court, but was ordered to stand over until it could be heard before a Divisional Court. To avoid any question the proceedings were removed by *certiorari* to this Court.

During Easter Sittings, May, 31, 1883, the case was argued.

E. H. Smythe, (of Kingston), for the prisoner. Sec. 45 of 32 & 33 Vict. ch. 22, D., makes the offence charged a felony. This indictment does not contain the word *feloniously* and no felony is charged. Under ch. 29, relating to the procedure in criminal cases, at p. 29, the form of indictment is given for malicious injuries, and it contains the word *feloniously*; and at p. 293 the general form of indictments is given, and it is said, after stating how the particular offence is to be described, “if the offence be felony state the act to have been done *feloniously*.” The prisoner could not have been indicted for misdemeanour. The case of *Regina v. Gray*, L. & C., C. C. 365, shews that the indictment cannot be supported; and this case has been approved of in *Re Boucher*, 8 P. R. 21, 4 App. 191.

J. G. Scott, Q. C., for the Crown. There is a distinction between our Act and the English one. Under our Act it is sufficient if the intent be shewn. The word "*feloniously*," is merely a formal word. It is a word of art. Its original use was to designate the mode of punishment to be inflicted for the offence, namely capital punishment, and not the offence itself, and when this was taken away in minor felonies, the word was still retained. In an indictment for burglary, the word *burglariously* is omitted; and in the indictment for offences against public peace, and offences against administration of Justice the word *felony* is omitted, and in the indictment for false pretences the word *false pretence* is omitted. Under the circumstances the indictment can be supported.

June 8, 1883. WILSON, C. J.—The section of the Act upon which the indictment was found makes the offence charged a felony, yet the word *feloniously* was not inserted by the Crown Counsel, by oversight no doubt. The form given in ch. 29 under the head "*Malicious Injuries to Property*" contains the word *feloniously*. There can, therefore, be no argument that the indictment is sufficient because the form has been followed under the enactment of sec. 27.

Regina v. Gray, L. & C. C. C. 365, which is but a repetition of the earlier law, is against the sufficiency of the indictment.

Authority may be found to shew that a misdemeanor under a statute will warrant a conviction as at the common law, where the offence is one at common law but I see nothing which warrants me in saying that a misdemeanor at the common law, made a felony by statute, afterwards be charged as an offence at the common law; at any rate not where there are any differences adverse to the prisoner in the mode of trial. And here there is the difference in the number of challenges.

There is still less reason for maintaining an argument of this kind when the offence is charged as contrary to the statute.

There is here a very plain mistake, and in place of the Crown Counsel joining in demurrer, he should have moved to quash the indictment, and have preferred a new one, and if the Counsel did not do so the learned Judge could, if requested, have ordered the indictment to be quashed. The delay and expense have been quite unnecessary, and as the defect is one of form only, we do now what could have been done at the trial, quash the indictment.

Indictment quashed.

GALT and OSLER, JJ., concurred.

[CHANCERY DIVISION.]

SMITH V. THE CORPORATION OF THE TOWNSHIP OF
RALEIGH.

Municipal corporation—Drainage by-law—Misappropriation of moneys assessed—Breach of trust—Mandatory order—Injunction—Parties—Attorney-General—Arbitration—R. S. O. ch. 175, sec. 529.

Where, on the petition of the plaintiff and other rate-payers, a township corporation had passed a by-law for the construction of the B. drain, and the assessment of the lands to be benefited thereby, part of which the plaintiff owned, but the drain had not been completed, though a reasonable time had elapsed, and a portion of the moneys assessed had been applied upon a certain other drain, not mentioned in the petition, the report of the public land surveyor made pursuant to R. S. O. ch. 529, or in the said by-law, and of no value to the said petitioners.

Held, that the plaintiff was entitled to an order compelling the corporation to complete the B drain according to the by-law, to an injunction to restrain further misapplication of the moneys assessed, and to an account thereof, for that the by-law created a trust which had been violated.

Held, also, that the plaintiff was entitled to maintain the action without the Attorney-General.

Held, also, that the fact that the moneys so assessed, were so diverted pursuant to a resolution of the council, passed in accordance with a promise made to certain of the petitioners for the B drain, who signed such petition and submitted to assessment, on the faith of such promise was no justification of such diversion.

Held, lastly, that this was not a case for arbitration, or, at all events, not a case in which the plaintiff was bound to proceed in that manner.

THIS was an action brought by one John Smith against the Corporation of the Township of Raleigh, claiming virtually a mandamus and injunction against the defendants, on the ground that they had been and were violating their duties in the expenditure of moneys raised by rate for the construction of a certain drain called the Bachus drain.

The facts of the case are fully set out in the judgment.

The case was heard at Chatham on May 11th, 1882, before Ferguson, J.

C. Moss, Q. C., for the plaintiff. The Attorney-General is not a necessary party. The main body of the public is not interested. As to the by-law, it is apparent that it has

not been complied with. The work has not been done. Our strong ground is, that a trust was created, and it was violated and has not been executed, though even if the plaintiff were merely applying for a *mandamus* he should succeed. The corporation pass a by-law to raise a special fund, for a particular purpose, to do a particular thing, in a particular way, for a particular class of persons, and this class are the contributors to the fund, and the funds must be kept separate: *Wilkie v. The Corporation of the Village of Clinton*, 18 Gr. 557. This corporation is shewn to have been in the habit of refunding the surplus, but the Municipal Act, R. S. O. ch. 174, is silent on the subject. Sec. 542 of that Act, points out how the corporation may be compelled to repair drains, &c. The corporation was in the position of a trustee. Could an individual placed under the same circumstances contend that he was not a trustee for the performance of the duty imposed with the money devoted thereto? Yet here there has been a reasonable time for the completion of the work. There has been a breach of trust by the diversion of the fund to an unauthorized purpose to the extent of \$90, which the defendants should have to account for.

Pegley, for the defendants. In the first place this action should have been by the Attorney-General. There is nothing on the record to prevent anyone maintaining a similar suit. Then again, no time is limited by the statute or by any other law for the completion of the work, and there has been no sufficient lapse of time since demand made to entitle the plaintiff to a *mandamus* here. Then there has been no improper expenditure of the fund here. The plaintiff's argument amounts to saying that the corporation should have defrauded the people south of the railway. It is clear the appeals of the ratepayers were not pressed, on the understanding that the resolution would be passed and the relief given. This is an exceptional case. There is no question here as to the good faith of the corporation. They are not trustees in any sense, but simply a corporation performing public duties.

September 15, 1882. FERGUSON, J.—The plaintiff is a ratepayer in the township of Raleigh, and the owner of lot No. 20 in the first concession thereof.

The proper majority, under the provisions of the statute, of the landowners interested in the construction of the drain known as the Bachus drain petitioned the council of the township of Raleigh for its construction, and on September 25th, 1880, a by-law was passed, pursuant to the provisions of the Act, for the construction of the drain according to the report, plans and estimates of Mr. McGeorge, a P. L. S., the engineer appointed by the township to report as to the desirability of the drain, &c.; and the by-law provided for the levying of moneys for the construction of the drain, and for the assessment of the land to be benefited by it, of which the plaintiff's land was a part. The by-law also appointed a commissioner to let the contracts for the construction of the drain and works connected therewith.

The contracts were let by the commissioner. It is charged, however, that proper security was not taken from the contractors, or some of them; and that the drain has not been completed, although a sufficient time for its completion has elapsed; and that the plaintiff has in consequence suffered damage; but the chief complaint is, that the defendants applied a portion of the moneys assessed on the land of the plaintiff and the other owners of land in the construction of a drain not mentioned in the petition, report, or by-law: and of no value to the plaintiff or the other petitioners, but, on the contrary, an injury to them. And the plaintiff claims an order to compel the defendants to complete the drain in accordance with the by-law, for the payment of the damages that he says he has sustained, for an injunction restraining the defendants from the further misapplication of the moneys so assessed, and for an account by the defendants of the moneys so assessed and raised for the construction of the drain, as well as such other order as may seem proper, and for costs.

The defendants say that they were not by the by-law, nor by the statute, limited as to the time within which the

drain should be completed, that they have proceeded with all proper and reasonable despatch, and as quickly as the weather and the nature of the work would permit, and that the same has been completed in accordance with the plans and specifications of the engineer, except a deviation on the plaintiff's farm, which they say was requested by the plaintiff himself, and as to which nothing more need be said here, as it is not now a subject of complaint.

The defendants, however, further say that at the time the petition was signed certain of the petitioners who are assessed heavily for the construction of the drain, and whose lands lay south of the lands of the Great Western Railway Co., were promised that a certain drain then already constructed, and running from their lands across the railway to the Bachus drain, should be cleaned out and made fit to carry the waters accumulating upon their lands to the Bachus drain, and without which the Bachus drain would be of no benefit to them, by reason of the embankment forming the roadway of the railway company, and that they signed the petition and submitted to the assessment on the faith of this promise, and that the defendants in fulfilment of this promise or agreement, and in consideration of the amount assessed against the lands of these petitioners, and to give them the benefit of the Bachus drain, for the construction of which they were assessed, by a resolution passed in Council directed that in justice to the ratepayers south of the Great Western Railway Co., the Bachus drain should be extended, to the line between the first and second concessions by the eastern boundary line of the township through lot 19 in the 5th concession, and that the commissioners should clear out the drain to this point, say, one hundred rods; and that with the exception of the moneys expended in clearing out the said drain, amounting only to the sum of \$90, all the moneys raised for the construction of the Bachus drain were properly expended in the construction of the same. They claim the benefit of the Municipal Acts, and say the plaintiff's remedy, if any, is by arbitration. They say that the

plaintiff discloses no legal or equitable grounds for relief, and claim the same rights as if they had demurred, and asks the costs of the action against the plaintiff.

The plaintiff, in his evidence says, that if the drain had been properly constructed in good time, he would have reaped \$50 or \$60 a year advantage that he has not had ; and this, I think, is not contradicted. Counsel for the plaintiff, however, at the time, said that he would not ask to have damages assessed, and only gave the evidence in regard to them for the purpose of shewing the interest that the plaintiff has in having the works properly done, and in consequence of this the counsel for the defence apparently forbore giving further evidence on the subject of the damages.

It is plain, I think, from the evidence that the drain has not been completed. It is admitted that the defendants did expend about \$90 of the moneys levied upon the ratepayers in the construction or clearing of a drain not embraced in the by-law, or in the profile or plans, or the report of the engineer, and they give their reasons as above for so doing.

The evidence shows that the amount of money received by the defendants for the work was \$2,462.66, and that of this sum the amount expended is \$2,298.87, leaving a balance in hand of \$163.79 ; but it is not shown what amount of money will be required to complete the work. It is shewn that the corporation (the defendants) has been in the habit of refunding to the ratepayers, in proper proportions or sums, balances that they have heretofore had in hand after the completion of works. It is said that certain of the ratepayers in this instance, whose lands lay south of the railway, forebore proceedings in appeal under the statute on the faith of a promise that the resolution above mentioned, or some such resolution, would be passed by the council ; it being assumed, I apprehend, that the council had power to pass such a resolution and carry the same into effect. It is not, I think, clearly shewn that any then existing appeal was abandoned on the faith of such

promise. Mr. McGeorge, the engineer, says the drain has not been completed; that he has passed some portions of it, but he has not passed that portion of it which is on the plaintiff's farm. He also says that the time occupied in constructing the drain has not been unusually long, and that some drains in the county have occupied a longer period. He does not say that the time has not been much greater than was reasonably necessary for the construction of the drain. The by-law was passed in September, 1880. This suit was commenced in the month of April, 1882. It is not easy to perceive why the work could not, by applying any reasonable degree of diligence and attention, have been completed in 1881.

From the evidence I glean that there is yet a very considerable amount of work to be done upon it. The fact that some other drains in the county have occupied in their construction a longer period, no special reason being assigned for it, does not, I think, afford ground for excusing the defendants from proceeding with reasonable diligence to complete the work for which they levied the money, or depriving the ratepayers of the benefits for which they have paid for any unreasonable time. The bonds, or contracts for the construction of various parts of the drain were put in. They bear date September 14th, 1880. By most of them the contractor became bound to have the work done by October 15th, 1880, and none had a longer period than till November 1st, 1880. Whatever excuse there might have been for not having the work completed in the fall of 1880, I can perceive no good reason why the work should not have been completed during the season of 1881.

It was argued on behalf of the defendants that, as there was no time limited within which the work should be done either by the statute or any other law, the plaintiff could not succeed as to this branch of his complaints. The effect of such a state of facts must be, I think, that a reasonable time must be adopted as the period for the completion of the work.

The defendants' counsel argued that the suit should have been by the Attorney-General, and that the plaintiff could not maintain it. It is plain, I think, that this is not a matter in which the public is interested, and I do not see that the Attorney-General ought to be the plaintiff. In *Wilkie v. The Corporation of the Village of Clinton*, 18 Gr. 557, it was held that when, for the purpose of erecting a market-house, the municipal council would require to levy a rate which would exceed the amount of two cents in the dollar allowed to be imposed by the Act, a ratepayer was entitled to an injunction restraining the erection of the building by the council. That, although a different kind of case, seems to me to involve, at least in some degree, the principle. There a limited number of the public were interested, and a ratepayer was permitted to maintain the suit against the council, the corporation. In this case a more limited number of the public is interested.

Counsel for the plaintiff placed his case chiefly on the ground that a trust had been created, and had been violated and not executed. Counsel for the defendants denied the existence of a trust. I am of the opinion that there was a trust, and I think the purpose of it was germane to the objects of the corporation: see *Dillon* on Corporations, 2nd ed., sec. 437; even if not, see *Mayor, &c., of Gloucester v. Osborne*, 1 H. L. at p. 285: but see also note to the same section of *Dillon*, 2nd ed. The defendants became possessed of moneys which they were bound to expend in a certain way and no other, for the benefit and advantage of certain land owners and ratepayers, of whom the plaintiff was one. It is admitted that a small sum (about \$90) of this money has been diverted from the purpose intended and otherwise expended by the defendants. They allege as an excuse the resolution of the council that I have before mentioned, passed for the alleged reasons that I have already alluded to. The by-law is one that required publication, and it was published as required by the Act. There was no notice or publication of the resolution, if this could have made any difference, and

looking at the statute, the by-law itself, and the safeguards thrown around the proceeding by the Legislature, I am of the opinion that the resolution, however well, and justly, and honestly intended, affords no justification whatever for diverting the money, or any part of it, from the intended purpose. If this were permitted, any council might, in the exercise of their judgment, even acting most sincerely and honestly, virtually engraft amendments upon such a by-law so that it would not be the by-law that was published and adopted, and might so divide the fund that the intended purposes could not be carried into effect. In my judgment the duty of the defendants was single, to apply the moneys in the construction of the drain mentioned in the by-law, and this it is admitted that, as to the sum of \$90 or thereabouts, they have not done. I am also of the opinion that a reasonable time for the completion of the work elapsed long before the commencement of this suit. I do not think the fact that part of the money was levied on roads belonging to the township can make any difference in the result. Counsel for the defence urged that those preliminaries necessary to found the motion for mandamus at law were not proved. I think that in granting a mandatory injunction such technical matters are usually dispensed with, and that the order is now made in the affirmative form. I am of the opinion that this was not a case for arbitration, or, at all events, not a case in which the plaintiff was bound to proceed by arbitration.

I think the judgment should be for the plaintiff, and that the defendants should be ordered to account for the moneys received by them for the construction of the drain, and to refund the sum diverted, the \$90, or thereabouts; that they should be ordered to complete the work, at least so far as the moneys will extend towards completing it, and that they should be enjoined against any further or other diversion of the moneys; and I think the judgment should be with costs.

[CHANCERY DIVISION.]

SEGSWORTH V. MERIDEN SILVER PLATING CO.

Interpleader issue—Chattel mortgage—Description of property—Pressure—Preference—Waiver—Costs—R. S. O. ch. 118.

R. being a creditor of A. applied to him to give security for his debt, and, under threat of suit, procured from him a chattel mortgage on his stock-in-trade. Although R. knew A. to be in difficulties, and had also the means of learning that he was insolvent, it did not appear that he actually knew that A. was insolvent when he obtained the mortgage; while the mortgagor sought to gain time and to go on with his business.

Held, that the mortgage given under such circumstances was not a fraudulent preference within R. S. O. ch. 118.

The goods and chattels were described in a chattel mortgage as follows :—Certain specific articles were first enumerated in the mortgage, and the description then proceeded, “also the stock of gold and silver watches, jewellery, and electro-silver plate, which, at the date hereof, is in the possession of the mortgagor in his said store,” (being a certain store of the mortgagor thereinbefore specified). The evidence showed the electro-plated goods and watches were numbered, and might have been identified thereby.

Held, a sufficient description of the goods mortgaged.

Where a sheriff seizes goods under writs of execution, and a mortgagee lays claim to them under a chattel mortgage, the fact that he subsequently directs the sheriff to sell under the executions, does not necessarily amount to a waiver of his claim under the mortgage.

Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mortgagee and the execution creditors that some of the goods seized, amounting to one-sixth of total value were not covered by the mortgage.

Semble, although the mortgagee was entitled to the general costs of the issue, a deduction of one-sixth should be made in respect of the goods as to which he failed.

THIS was an interpleader issue, directed between the plaintiff as assignee of a chattel mortgage and the defendants as execution creditors of the mortgagor.

The issue came on for trial before Boyd, C., at Toronto, on December 1st, 1882.

It appeared by the evidence that Learnington Atkinson, the execution debtor, being in difficulties, at the solicitation of Rowland, a creditor, under threat of suit, executed a chattel mortgage in his favour on March 30th, 1882, to secure a debt due to Rowland. This mortgage was subsequently assigned to the plaintiff.

It also appeared that Rowland knew that Atkinson was in difficulties, and might have learnt that he was, in fact, insolvent, but that he had not, at the time of taking the mortgage, actual knowledge that Atkinson was insolvent.

The mortgage in question was made between "Leamington Atkinson, of the town of Newmarket, in the county of York, and Province of Ontario, jeweller, thereafter called the mortgagee of the first part," and the mortgagees of the second part, and recited that "whereas the mortgagor is indebted to the mortgagees in the sum of \$997, and has been pressed by them to give security therefor, and in consequence of such pressure has agreed to give this security." This was the only recital in the mortgage. The goods and chattels were described as follows:

"All and singular the goods, chattels, furniture, stock, and household stuff, hereinafter particularly mentioned and described: one regulator, French make; one twelve foot show case and trays; one square nickle case; one walnut electro-plate case; and Edward's fire-proof safe; all in the occupation of the mortgagor in his store on the west side of Main street, in the said town of Newmarket, on lot number five of the Botsford's survey, and immediately north of the market. Also the stock of gold and silver watches, jewellery, and electro-silver plate which, at the date hereof, is in the possession of the mortgagor in his said store, and also all such stock of gold and silver watches, jewellery, and electro-silver plate which the mortgagor may hereafter, during the currency of this indenture, or of any renewal thereof, get, take, and receive into his possession in his said store either to replenish such stock or otherwise howsoever."

There was evidence given, showing that the electro-plated ware and watches were numbered, and that each article could be distinguished by the number impressed thereon.

There was no evidence that any of the goods in question had been acquired by the mortgagor since the date of the mortgage. The evidence established that some of the goods seized were clearly not covered by the mortgage.

W. A. Reeve and *D. E. Thomson*, for the plaintiff, were not called on.

D. McCarthy, *Q. C.*, and *Creelman*, for the defendants.

The description of the goods is insufficient. *Harrison v. Roberts*, 7 C. P. 470; *Kingston v. Chapman*, 6 C. P. 130; *Wilson v. Kerr*, 17 U. C. R. 168; *S. C.* 18 U. C. R. 470; *Mason v. Macdonald*, 25 C. P. 435.; *Holt v. Carmichael*, 2 App. R. 639; *Howell v. McFarlane*, 16 U. C. R. 469. The mortgage was a fraudulent preference. The mortgagee must be taken to have known that the mortgagor was insolvent. He had the means of acquiring that knowledge, and if he forbore to make enquiries that cannot make the transaction valid. His threatening to sue was not *bonâ fide* pressure: *Ex parte Hall*, L. R. 19 Ch. D. 480.

The doctrine of pressure does not apply where, as here, the whole stock in trade of the debtor is assigned: *Ex parte Foxley*, L. R. 3 Chy. 515; *Ex parte Stevens*, L. R. 20 Eq. 786.

December 1, 1882. BOYD, C.—I am not embarrassed by the fact that the mortgage purports to cover property to be afterwards acquired, because there is no evidence that any property was acquired subsequent to the mortgage. The description is, I think, sufficiently certain within the decisions. Mr. Barron, in his book on "Chattel Mortgages," has, I think, correctly stated the effect of those decisions at p. 229. Here there is a sufficient definition of the nature of the property intended to be mortgaged, coupled with a local description of where it was situate.!

It was argued that the mortgagee had, by directing the sheriff to sell under his execution, waived his rights under the mortgage. I do not think there was any such intention on the part of the mortgagee, and that he did not, in law, waive his rights under his mortgage. He consented to the sale because, being interested also as an execution creditor, the sale by the sheriff could be better carried out

by an absolute sale than by a sale of the goods subject to the mortgage.

The mortgage is attacked as being void under R. S. O. ch. 118. Although Rowland had the means of knowing that Atkinson was insolvent, at the same time it does not appear that he followed up this means of knowledge, or actually knew that he was then insolvent, or on the eve of insolvency, and there is nothing in the evidence to show that the transaction was colourable. On the contrary, it was clear that Atkinson thought by giving the security he would be gaining time, and hoped and intended to be able still to carry on his business. What took place amounted to pressure within the cases. *Ex parte Hall*, L. R. 19 Ch. D. 480, therefore, does not apply.

I think the mortgagee is entitled to succeed as to the proceeds of all goods covered by his mortgage. It appears, however, that some of the goods seized by the sheriff were not included in the mortgage. The mortgagee has made no exception, and has claimed the whole. The goods not included amounted to one-sixth of the whole. As to the latter he fails. If the costs were in my discretion, I think the mortgagee should get the general costs of the issue subject to a deduction of one-sixth.

[CHANCERY DIVISION.]

CHURCH V. FULLER ET AL.

Specific performance—Costs—Jurisdiction—Costs to be paid by successful defendant.

Whatever may be the rule in England, this Court has maintained jurisdiction to make a defendant pay costs in a suit for specific performance, though the bill be dismissed, if the circumstances be such as to warrant doing this.

Hence, in such a suit, brought by the purchasers of certain lands, against the vendors and a subsequent purchaser. Where the Judge of first instance dismissed the action without costs, but gave the subsequent purchaser his costs against his co-defendants, although no issue was raised between the defendants.

Held, that he had jurisdiction to make the order, in his discretion, and having exercised such discretion, this Court would not interfere.

McMahon v. Barnes, Order Book No. 9, fol. 730, (not reported,) followed.

THIS was a motion by way of appeal from a decree made by Boyd, C., at the trial of the above action. The action was brought by one George Church for the specific performance of an alleged agreement for the sale of certain lands. The defendants were the alleged vendors, one Nelson their alleged agent in the matter of the sale, and one Francis Gebbie a subsequent purchaser from them.

The plaintiff claimed a declaration that he was entitled to the said lands upon the performance of his part of the alleged contract of sale or on payment in cash; or in the event of the defendant Gebbie being a *bonâ fide* purchaser for value without notice (which the plaintiff charged that he was not), that the vendors and their said agent should be ordered to pay damages to the plaintiff and costs of suit; or that if the said agent had no authority to sell the land that he should be ordered to pay the plaintiff all damage and loss sustained by him and costs of suit, and for general relief.

The defendant Gebbie, in his statement of defence, claimed to be a *bonâ fide* purchaser for value, and to hold the lands under a duly registered conveyance from the

vendors. He also claimed the benefit of the defences of his co-defendants.

The defendant Nelson, in his statement of defence, denied that he had made any concluded and binding contract with the plaintiff for the sale of the lands in question.

The defendants, the vendors, in like manner denied that any contract binding on them had been entered into with the plaintiff.

The action was tried before Boyd, C., at the sittings of this Court at Chatham, on September 27th, 1882, when the learned Chancellor dismissed the plaintiff's claim without costs, but ordered the costs of the defendant Gebbie to be paid by his co-defendants the vendors, and Nelson.

The defendants the vendors, and the defendant Nelson now moved by way of appeal to the Divisional Court, from the order as to costs. The motion was made on December 8th, 1882, before Proudfoot and Ferguson, JJ.

C. Moss, Q. C., and *Nesbitt*, for the appellants. The Court had no jurisdiction to award costs to a defendant against his co-defendants as they have done. There was no contest between the defendants. Moreover, when a plaintiff has no title and his case is dismissed no order can be made in his favour. In *McMahon v. Barnes*, Order-book 9, p. 730, the bill was dismissed in a suit for specific performance, but the defendants were made to pay the costs (*a*). We also cite *Dicks v. Yates*, L. R. 18 Ch. D. 76; *Witt v. Corcorn*, L. R. 2 Ch. D. 69; *Brodie v. St. Paul*, 1 Ves. jr. 325; *Re Foster and The Great Western R. W. Co.*, L. R. 8 Q. B. D. 25, S. C. in App. 515; *Rudno v. Great Western Mutual Life Ass. Soc.*, L. R. 17 Ch. D. 600; *Campbell v. Robinson*, 27 Gr. 634; *Morgan and Wurtzburg on Costs* pp. 98, 124.

No one appeared for the plaintiff or for the defendant Gebbie.

* Spragge, C., Dec. 16, 1857, unreported.

February 15, 1883. PROUDFOOT, J.—The Chancellor, in this case, one for specific performance by a purchaser against the vendors and another purchaser, dismissed the bill without costs, but gave the defendant Gebbie, the purchaser, his costs against the defendants the vendors.

The vendors object to this, as there was no issue between the co-defendants, and because where a plaintiff has no title no order could be made in his favour, and therefore no decree could be made as between co-defendants.

It was not necessary that any issue should be raised on the pleadings between the co-defendants to justify the direction as to costs. All the facts appeared on the pleadings, and the parties were at liberty to argue upon them as to the proper order to make in regard to costs.

But it was said that when a plaintiff has no title, when his bill is dismissed, no order could be made in his favour; and some of the English cases cited go that length.

Re Foster and Great Western R. Co., L. R. 8 Q. B. D. 515, professing to act on the rule in the Court of Chancery as stated in *Tidwell v. Ariel*, 3 Madd. 403, 409, and *Cooth v. Jackson*, 6 Ves. 11-41, decided that there was no jurisdiction to make a railway company, in whose favour an application to the Railway Commissioners had resulted, pay costs to the unsuccessful applicant; and in *Dicks v. Yates*, L. R. 18 Ch. D. 76, the M. R. says, "No one has ever heard of a defendant being ordered to pay the costs of the plaintiff who has failed to make out any title." The cases prior to *Re Foster and Great Western R. W. Co.*, *supra*, are cited in *Morgan and Wurtzburg on Costs*, 96-98, and the want of jurisdiction to make such an order is by no means so clear as the last case would lead one to think. The language of Knight Bruce, L. J., in *Dufaur v. Sigel*, 4 De. G. M. & G. 525, expresses doubt: "Without saying that the jurisdiction does not exist, I think it a jurisdiction of considerable delicacy and difficulty." The conduct of the railway company in *Re Foster* was unimpeachable, they had not offended against the Statute as they were alleged to have done, and in such a case

there is no doubt that the Court of Chancery would not have made them pay costs. And in the cases where the language against the jurisdiction was used it will be found, I think, that the defendant was in no default.

But whatever may be the rule in England, this Court has maintained the jurisdiction to make a defendant pay costs in a suit for specific performance when the bill was dismissed, if the circumstances were such as to warrant it. So long ago as 1858 this was decided in *McMahon v. Barnes*, not reported. The order will be found in Order Book No. 9, fol. 730. In that case Barnes contracted on April 7th, 1855, to sell the land in question to the plaintiff, and on the 2nd of May he sold a portion to the defendant Smith. The bill was brought against both for the specific performance of the contract with the plaintiff. Smith denied notice of the contract with the plaintiff. An issue was directed to try this question, and the jury found in favour of the defendant. The Court were not satisfied with the finding, considering the evidence would have justified a finding the other way. An order was therefore made dismissing the plaintiff's bill on payment of costs by the defendants, and they were ordered to pay them.

That case is binding upon us, and we must follow it till overruled by a higher court.

There being jurisdiction in the Court to make such an order, the making of it was a matter within the discretion of the Judge, and having exercised it we ought not to interfere with it.

The decree is therefore affirmed, with costs.

FERGUSON, J., concurred.

[CHANCERY DIVISION.]

COTTON V. MITCHELL ET AL.

Action for partnership account—Statute of Limitations—21 Jac. 1 ch. 16.

Where in an action for a partnership account on a contract for work done on a canal, it appeared that the business had been closed, the books made up, a final estimate obtained, and the plant sold, more than six years before the commencement of the action.

Held, that the plaintiff was barred by the Statute of Limitations, and the fact that within the six years, a certain sum had been paid over to the plaintiff's solicitors, but without his knowledge, as the full amount of the partnership profits due to the plaintiff, could not operate to take the case out of the statute.

IN this action one James Cotton was plaintiff, and Robert Mitchell and Michael Fitzgerald were defendants. The writ of summons was issued on October 3rd, 1882.

By his statement of claim in the action the plaintiff set out that he and the two defendants were contractors: that by articles of partnership, of February 5th, 1872, made between them, they agreed to enter into partnership for carrying out a certain contract on the Welland Canal enlargement, and that the defendants should furnish the necessary funds therefor, and the defendant, Robert Mitchell, should have the management and general superintendence of the said contract, and should receive all moneys paid by the Government upon or on account of the said contract; and Robert Mitchell also agreed thereby to account for all moneys received by him on account of the said contract, and upon the completion thereof furnish the plaintiff with a detailed statement of the receipts, expenses, net proceeds, and profits of the said contract, and produce proper vouchers for all expenditures in connection therewith; and the three further agreed that the profits arising out of the partnership business should be divided equally between the plaintiff and the defendant: that the contract referred to in the said articles had long since been completed, but no account of the partnership dealings had been given by the defendants to him, the plain-

tiff, but the defendants had refused and still refused so to do, nor had he, the plaintiff, received any sum for profits on account thereof. The plaintiff asked to have an account taken of the partnership dealings and transactions under the said agreement, and to have the partnership wound up, and for payment to him by the defendants of such sum as he might be found entitled to on such accounts, and for damages sustained by the plaintiff by reason of the said defendants not duly furnishing the necessary funds and plant for carrying on the partnership business, as they agreed to do in the said articles of partnership.

Both defendants delivered statements of defence, of similar purport, wherein they admitted the partnership articles, but set up that more than six years before the commencement of the present action the said partnership business was closed, and the amount coming to the plaintiff ascertained and paid over to him, and that the plaintiff's right of action (if any) for an account of the said partnership dealings and transactions arose more than six years before the commencement of this action. They also denied that any sum was due the plaintiff under the said articles, and also that they refused to give an account, or failed to furnish any funds or plant which they were bound to furnish, or that the plaintiff suffered any damage by reason of any such failure on their part; and they said the plaintiff's right of action (if any) in respect of the said alleged damages arose more than six years before the commencement of the present action.

The cause was heard at St. Catharines, on March 23rd, 1883, before Ferguson, J.

J. O'Donohoe, Q.C., for the plaintiff, put in the partnership articles, and the contract for the enlargement of the Welland Canal, which was not disputed; and also the examination of the defendant Mitchell; and it was admitted that the contract work was done, and that profits arose upon the contract. But the plaintiff produced no evidence to shew that the necessary funds and plant were not duly

furnished, or to shew any breach of any of the covenants contained in the articles of partnership.

From the examination of the defendant Mitchell, it appeared that the work under the contract was finished in July or August, 1875: that the final estimate was obtained by January 29th, 1876³; and that the plant was sold on August 13th, 1875, the plaintiff attending at the sale: that books of the partnership were made up by the book-keeper in February, 1876: that the defendant Fitzgerald was paid his share of the business profits, before the obtaining of the final estimate, he accepting the amount paid him as correct: that he had never settled the partnership business with the plaintiff, because the never could get him to do any thing, or to look at the books: that Cotton's share of the profits amounted to the same as Fitzgerald's, viz., \$926.16: that he, Mitchell, had charge of the whole business and received all the money: that he gave Cotton \$200 in cash, in April, 1872: that he also paid for the plaintiff to Miller & Miller, solicitors, on account of law expenses incurred by the plaintiff on separate occasions, \$50, \$55, \$62.63, and \$631.43: that he understood this last amount of \$631.43 was garnished by some one: that the \$631.43 was paid about November 1st, 1876: that this money was not paid at the plaintiff's request, nor was he, Mitchell, aware that the plaintiff was ever notified of it: that the \$631.43 was the balance in which the partnership was indebted to the plaintiff.

After the close of the plaintiff's case:

S. H. Blake, Q.C., for the defendants. This suit must be looked upon simply as one for an account, the plaintiff having produced no evidence of any breach of the covenants in the articles of partnership. Under these circumstances the plaintiff is barred by the Statute of Limitations, which began to run at latest in January, 1876, and the plaintiff should be nonsuited: *McFadgen v. Stewart*, 11 Gr. 272; *Knox v. Gye*, L. R. 5 H. L. 656; *Tatam v Williams*, 3 Ha. 347, cited in *Knox v. Gye*, supra; *Noyes v. Crawley*, L. R. 10 Ch. D. 31; *Miller v. Miller*, L. R. 8 Eq. 499; *Addison on Contracts*, 4th ed., p. 1014.

March, 23rd, 1883. FERGUSON, J.—Both the defendants set up the Statute of Limitations. Issue is taken upon these pleas. The cause of action for the account asked arose, I have no doubt, not later than January, 1876, when the final estimate was received, and more than six years before the commencement of this suit. I do not think that the contention that the handing of a sum of money to Messrs. Miller & Miller, as the full amount due the plaintiff, and this, rather unaccountably, without the plaintiff's knowledge, can so operate as to take the case out of the operation of the statute; and I think the cases referred to by the defence shew clearly enough that the Statute of Limitations is a bar to a suit of this kind, which must be considered simply as an action for an account of partnership dealings, &c. It is not sought to place it on any other footing. I am of the opinion that the defence succeeds and that the action must be dismissed, with costs.

[CHANCERY DIVISION].

RE MCCAUGHEY AND WALSH, SOLICITORS.

Solicitors—Striking off the rolls—Partners—Absence of personal misconduct—Summary jurisdiction.

To justify an order to strike a solicitor off the rolls there must be personal misconduct; it is not enough to show that his partner has been guilty of fraudulent conduct, from which a constructive liability to pay money may perhaps arise. The Court is not in the habit of exercising even the lesser jurisdiction of ordering payment in a summary manner against a solicitor to whom personally no blame is attributable, though he may be responsible for his partner's acts.

St. Aubyn v. Smart, L. R. 3 Ch. 646 distinguished.

THIS was a motion on behalf of one M. Walsh, a solicitor, to discharge an order made on petition, on June 10th, 1879, directing his partner, James McCaughey, and himself to pay over certain moneys, or in default to be struck off the rolls.

It appeared that Walsh had instructed his agents in Toronto to move against the order on being served with it in June 1879, but the petitioner at that time arranged that the matter should stand, so far as Walsh was concerned, and the money should be made out of McCaughey. Shortly before making this motion, however, the solicitors for the petitioner informed Walsh that they were instructed to issue *fi. fas.*, against him for the costs of the said order, the amount received by McCaughey having been paid by him, and that they had placed *fi. fas.*, against him for the amount in the sheriff's hands.

The remaining facts of the case sufficiently appear in the judgment.

The motion was made on April 2nd, 1883, before Proudfoot, J.

J. H. Macdonald, for the applicant. Though Walsh may be legally liable for the debt, he is not liable to the summary jurisdiction of the Court, unless for personal misconduct: *Re Campbell, an Attorney*, 32 U. C. R. 444 ;

In re Lawrence, Crowdy & Bowlby, 2 S. & G. 367; *Dixon v. Wilkinson*, 4 Drew. 614.

N. Hoyles, contra. Walsh is liable for the money, and therefore he is liable to this proceeding: *Re Fletcher*, 28 Gr. 413; *Re VanNorman*, Spragge, C., March 9th, 1880; *Re Legys*, Blake, V. C., May 19th, 1879. (a)

April 4th, 1883. PROUDFOOT, J.—This is a motion on behalf of Mr. Walsh to discharge an order made upon McCaughey and Walsh, solicitors, to pay money, or in default to be struck off the rolls.

The money was received during the partnership by McCaughey alone; no entry was made of it in the books of the firm; no charges are made in these books for the collection of it. Walsh knew nothing of the receipt, and he says he had no notice of the application for the order.

As to this last ground, the petition seems to have been served on a firm of solicitors, who admitted service for McCaughey and Walsh, and I apprehend the order cannot be set aside for want of notice.

I assume the facts to be [such as might render Walsh liable for the amount received by his partner in an action, or by an application to the summary jurisdiction of the Court. But it is entirely a different question when an application is made to that summary jurisdiction to strike him off the rolls. The case *St. Aubyn v. Smart*, L. R. 3 Ch. 646, is no authority for that proposition. The bill in that case was filed for the recovery of the money, and the contention was principally that the remedy was at law; and it was held that the Court had power to call a solicitor to account for money which has passed into his hands as the result of proceedings in Court. A petition for that purpose is enough if the liability is not disputed; if it is, the jurisdiction of the Court is no less clear, to maintain a bill for the purpose. But in such a proceeding there could have been no question of striking off the rolls.

(a). Not reported.

But that case differs widely from this, as after the defaulting partner absconded the defendant made charges in connection with the transaction, and the Court found the defendant had full knowledge of the receipt of the money, while here that is shewn not to have been so.

Nor has *Re Fletcher*, 28 Gr. 413, any material effect upon the present case; for all the defendants united in declining to hand over money to the client; and the only question decided was that the client by suing for the debt had chosen his own remedy and his own forum.

To justify an order to strike a solicitor off the rolls, there must be personal misconduct; it is not enough to shew that his partner has been guilty of fraudulent conduct from which a constructive liability to pay money may perhaps arise. The Court is not in the habit of exercising even the lesser jurisdiction of ordering payment in a summary manner against a solicitor to whom personally no blame is attributable, though he may be responsible for his partner's acts. See cases in *Lindley* on Part., 3rd ed., vol. 1, p. 319; and much less will the Court exercise this penal power over a solicitor to whom no blame is ascribed.

It is no answer to say that the client is not seeking to enforce the order as to striking off the rolls; for the solicitor is entitled to have an order discharged that could only have been properly granted on the ground of personal misconduct. It forms a standing imputation on his professional conduct from which he is entitled to be relieved.

It is possible the client may be able to make him responsible in another mode of procedure; but this order, so far as Mr. Walsh is concerned, must be discharged, with costs.

[CHANCERY DIVISION.]

EDWARDS V. MORRISON ET AL.

Registry—Notice—Mortgage—Notice of state of mortgage account—Wife joining to bar dower—Estoppel—R. S. O. ch. 111.

On April 4th, 1863, M. and his wife (to bar dower) mortgaged the lands in question to C. On May 21st, 1867, M., being in insolvent circumstances, conveyed the said lands to W. to the use of M.'s wife. In 1868, and 1872 M. executed two other mortgages to C. for the debt originally secured by the first mortgage. On December 20th, 1874, M. and his wife (to bar dower) mortgaged the said lands to C. All the above deeds were registered about the time of their respective executions. On March 6th, 1876, G. assigned to the plaintiff, but the deed was not registered. On June 7th, 1876, M. and his wife jointly mortgaged the same lands to the plaintiff by deed registered July 15th, 1876. On May 21st, 1874, W. and M. and his wife granted and released the said lands to C. until payment of the mortgage of 1872, and on payment thereof to the use of M. in fee. This, however, was not registered till August 4th, 1881. The plaintiff had no notice that the conveyance from M. of May 21st, 1867, was invalid, nor of the conveyance of May 21st, 1874, but he had notice of the three mortgages to C., and that C. claimed the whole debt against the land, and also that there was a defect in C.'s title under the second and third mortgages.

Held, that the plaintiff, being bound by such notice, could not avail himself of any defect in title arising from M. executing the latter two mortgages to C., although still being the owner of the equity of redemption, that the plaintiff acquired his title with knowledge that C. claimed a debt represented by the three mortgages, and took his mortgage, subject to such claim by C.

Held, also, that the deed from M. of May 21st, 1867, was either voluntary or a fraudulent preference, and in either case void; and that the fact that M.'s wife joined to bar dower, in the two last mortgages to C. after she had apparently become the owner of the equity of redemption, constituted her a party to the accounting which took place with C. in respect to the continuing debt, and bound her in her character of assignee of the equity of redemption if she could be so considered.

THIS was an action between Richard Edwards, plaintiff, and Robert Morrison, Mary Morrison, his wife, the Canada Permanent Loan and Savings Company, and James S. Fead, defendants. The plaintiff claimed to be entitled to a lien and charge upon the lands in question for the sum due for principal and interest under a certain mortgage of June 7th, 1876, made by the defendants Robert Morrison and Mary Morrison to himself, in priority to any lien or charge thereon of the defendants the Canada Permanent

Loan and Savings Company and James S. Fead: that he might be paid the said sum and costs, or in default the defendants might be foreclosed; delivery up of possession, immediate payment, and general relief.

At the trial at Toronto, before Wilson, C. J., C. P. D., May 1st, 1883, the deeds and documents produced, and the evidence adduced, shewed the facts of the case to be as follows:—

Robert Morrison was the original owner in fee of the lands in question.

On April 4th, 1863, Robert Morrison, his wife joining to release dower, mortgaged in fee to the Canada Permanent Company. Registered April 16th, 1863.

On May 21st, 1867, Robert Morrison conveyed to Edward Willis, to the use of Mary Morrison, the wife of the grantor in fee. Registered June 26th, 1867.

On March 14th, 1868, Robert Morrison, and his wife as to dower, mortgaged to the said company in fee. Registered March 26th, 1868.

On December 17th, 1872, Robert Morrison and his wife, as to dower, mortgaged to the said company in fee. Registered December 20th, 1872.

On September 5th, 1873, Robert Morrison and his wife, as to dower, mortgaged to the defendant Fead in fee. Registered October 8th, 1873.

On December 21st, 1874, Robert Morrison and his wife, as to dower, mortgaged in fee to David Glover. Registered October 7th, 1874.

On March 6th, 1876, David Glover assigned to the plaintiff. Not registered.

On June 7th, 1876, Robert Morrison and his wife jointly mortgaged in fee to the plaintiff. Registered July 15th, 1876.

On May 21st, 1874, Edward Willis, Robert Morrison, and his wife granted and released in fee to the said company until payment of the mortgage of December 17th, 1872, and on payment thereof to the use of Robert Morrison in fee. Registered August 4th, 1881.

The three mortgages of the company were all for the

same debt. No advance was made on either the second or third mortgages. The claim of the company on the third mortgage was the amount still due upon the first mortgage. The second and third mortgages were taken merely in extension of the time for payment.

The evidence of one of the solicitors of the company was that the first and second mortgages were not discharged purposely, because the debts had not been paid.

There was no objection made by the plaintiff to the first mortgage of the company, nor to the account of what was due to the company being taken under it. The objection was to the account being taken upon either the second or third mortgage.

The ground of objection was, that after the company took their first mortgage, and before they took their second mortgage, Robert Morrison, the mortgagor, on May 21st, 1867, conveyed the mortgaged land in fee to Willis, as before stated, to the use of and in trust for Mary, the wife of Robert Morrison, in fee; and that she, and not her husband was after that the owner of the equity of redemption: that the plaintiff got the first mortgage from the wife as owner of the equity of redemption on June 7th, 1876, to which her husband was a party, and that the plaintiff was therefore entitled to rank next after the first mortgage to the company, and was in no way bound by the second or third mortgages of the company.

The only evidence material to be considered was the following:—

Robert Morrison, the defendant, who was examined for the company, said when he bought the land he paid \$400 to one Campbell for his right, more than a year before he mortgaged to the company, and \$381 of that sum was given to him by his wife, and the company paid so much out of the mortgage money to take out the patent: that Glover, to whom he gave a mortgage, was his brother-in-law, and it was by his advice he made the deed in trust to Willis for his wife. He said: "I was in pecuniary difficulty from losses and sickness, and Glover advised me to

secure it for the family :” that Mr. Robertson, the manager of the company, told him the deed he had made to his wife was of no use, and she gave it up to him. That was when she made the deed to the company on May 21st, 1874. About two years ago the plaintiff said he was going to buy out the company’s claim. The witness said : “ I paid the plaintiff about that time \$150. I did so on his promising to pay the company’s claim. If he had not promised to do so I would have paid the \$150 to the company. The company offered the land for sale, and \$2,400 only was bid for it. That was since 1876. When the mortgage was given to the plaintiff he said nothing of my wife being owner of the land.” The plaintiff’s examination was read by the company. “ I bought the mortgage to Glover from Mr. Kellar, who was acting for Glover. It was understood to be subject to the company’s mortgages and to Fead’s mortgage. I had never seen the property. Mr. Kellar told me the mortgage was not right, and if I bought I had better be sure the mortgage was from Mrs. Morrison. Mr. Kellar told me the company’s claim was about \$1,200, and that he did not think their last mortgage was good. He did not say the company had \$2,950 against the land. I agreed to buy Glover’s mortgage, taking it subject to the company’s mortgage for \$1,200. Kellar told me the place was worth from \$2,500 to \$3,000. Mr. Kellar proposed it would be better to take a mortgage from Mrs. Morrison, as she was the owner of the property. I am not aware Mr. Kellar investigated the title. He said he had made enquiries in Toronto at the office of the company’s solicitors, and he did not consider the last mortgage to the company was all right, but that the solicitors contended they could fall back upon the old one. I do not think I told Mrs. Morrison there was any difficulty about the company’s mortgage. * * Mr. Kellar did not tell me the company had a quit claim from Mrs. Morrison’s trustee. I cannot say I ever thought my mortgage was prior to the company’s claim until I consulted my solicitor, which was after the sale.”

In cross-examination he said: "There was never any understanding that I should pay the company. I had no understanding with the company or with Morrison when I bought the Glover mortgage, nor that I was to take subject to the company's mortgage, because I expected Morrison would pay my mortgage off."

On re-examination he said: "Mr. Kellar told me there were prior mortgages, and of course I had to take subject to them. He told me there was about \$1,200 due to the company. I bought the Glover mortgage on the understanding I was to get a new mortgage from Mrs. Morrison."

The evidence for the plaintiff was that of Charles K. Kellar:—

"I negotiated the sale of Glover's mortgage to the plaintiff. I recommended him to get a mortgage from Mrs. Morrison from what I saw on the abstract of title, and after I had seen the company. I saw Mr. Jones, solicitor for the company, and asked him if he had a document from Mrs. Morrison and Willis back to Mr. Morrison, or any conveyance that could cure the defect of the title. I thought such a document was not registered. Mr. Jones said he had no such document. I made further enquiries, and could not find such a document, and I then said to Glover and the plaintiff there must be a new document, and it was drawn. I was enquiring about this for three or four months before the new mortgage was drawn. I told Mr. Jones the plaintiff was negotiating for the Glover mortgage."

In cross-examination he said: "I enquired also of Mr. Morrison, and he said he knew nothing of such a document. I asked Mr. Jones what he would do, as there was no such document—that the second mortgage was bad. He said the company would fall back on their first mortgage: that they never discharged their mortgages till all was paid up."

The evidence also shewed that an abstract of title was procured by the company on March 27th, 1868, in which the registration of their second mortgage appeared,

and in that abstract was entered the conveyance from Morrison to Willis (registered at length, according to the certificate on the back of the duplicate now produced), and opposite the entry of that conveyance on the abstract was written by the company's solicitor, "This amounts to nothing."

McMichael, Q. C., and *A. Hoskin*, Q. C., for the plaintiff. The deed to Willis in trust passed the legal estate to the wife. It was made to Willis to the use and in trust for the wife. The deed from Morrison and wife and Willis to the company, although made on May 21st, 1874, was not registered until August 4th, 1881, and the deed from Morrison and wife to the plaintiff, although dated on June 7th, 1876, is entitled to priority over the deed of May 21st, 1874, because it was registered on July 15th, 1876, and before the deed to the company. The plaintiff had no notice of the deed from Willis and others to the company of May 21st, 1874. He endeavoured to discover such a deed, and he applied to the company's solicitors and to Morrison, and they each told him there was no such document. If notice of such a deed could be of any avail under the Registry Act, there was no such notice: R. S. O. ch. 111, secs. 74, 80, 81. The second and third mortgages to the company cannot be supported against the plaintiff's claim, for the equity of redemption at the times they were made was in the wife and not in her husband, and she joined in them only as to her dower. The plaintiff had no notice of any invalidity of title in the wife. There is a good consideration to support the trust deed, namely, the sum of \$381, which the wife had advanced to her husband to enable him to buy the land. The later mortgages to the company cannot be treated as statements of account between the company and Morrison, because the wife is no party to his statement of the account.

Lush, Q. C., for the company. The first mortgage is a continuing security, because never discharged. What was dealt with after the first mortgage was a mere equity.

The deed to the wife cannot be supported, because there can be no use or seisin in or of an equity of redemption. The equity of Morrison remained in Willis, and he conveyed afterwards to the company. The plaintiff did not take the mortgage, claiming to take priority over the company's second and third mortgages, but subject to them, and it is only of late he is setting up a priority. The deed from the husband to the wife was and is void against creditors, for the husband was insolvent at the time, and it was expressly made to keep the land from his creditors and to provide for his family.

McMichael, in reply. The equity of redemption may be dealt with in like manner as if it were a legal estate, because equity regards the land as a security only, and the estate as vested in the mortgagor. The plaintiff bought subject to the first mortgage only of the company. The company never informed the plaintiff or any one for him that the deed to the wife was void as against creditors.

June 6, 1883. WILSON, C. J. C. P. D.—The conveyance “to Willis and his heirs to the use of and upon trust for the wife, her heirs and assigns” transferred the estate and interest of the husband in the land direct to the wife, the conveyance requiring no act to be done by Willis for or in respect of the estate.

The equity of redemption will pass by the like kind of conveyance and in like manner as the legal estate in the land. I think neither the plaintiff nor Mr. Kellar, who was acting for him, had notice of the existence of the deed from the husband and wife, and Willis to the company. They did hear something of there being such a deed, but from whom or in what manner does not appear, and they made enquiry for it but could not find it, and they were told by the company's solicitors and also by Morrison there was no such conveyance, and it was not registered then nor until lately, and as the evidence shews, they acted in good faith, in the belief there was no such deed; and the prior registration by the plaintiff of his mortgage from

Morrison and wife to him of June 7th, 1876, is, so far as the question of registration is concerned, a protection to the plaintiff against the deed to the company of May 21st, 1874, not registered till long after the plaintiff's mortgage.

The plaintiff and his agent Mr. Kellar had both express notice and knowledge of the three mortgages of the company, and the plaintiff took his mortgage in fact under the belief that the land was burdened with the debt which the company claimed by their third mortgage, and that his mortgage ranked after the company's mortgages. I think the conveyance from the husband to Willis in trust for the wife was made without consideration, and was and is void and fraudulent against creditors, for the husband was at the time unable to pay his debts; and even if there had been a consideration to support the deed, such conveyance would nevertheless be void as a fraudulent preference.

I have now to consider what effect is to be given to the second and third mortgages of the company, the husband granting and the wife releasing her dower, assuming the conveyance to Willis, as trustee for the wife, to be free from the objection of its being void as against creditors, and to have transferred the equity of redemption to the wife, and assuming the conveyance from Willis and the husband and wife to the company not to have been made, the plaintiff having notice and knowledge of these mortgages, but not of the deed to Willis, before and at the time he became the assignee of the mortgage from Glover. No question was raised before me whether Glover had or had not notice of the three mortgages of the company, or of the deed from Willis, and Morrison and his wife to the company.

The plaintiff rested his case, so far as notice is concerned, on notice to himself. It may be that notice to Glover could have been proved. He is the brother-in-law of Morrison, and advised him to make the deed to Willis in trust for his wife, and what is strange, he himself afterwards took the mortgage to himself, not from Mrs. Morrison

but from her husband, Mrs. Morrison releasing her dower. He no doubt knew of the mortgages to the company, and of the deed to Willis in trust, but whether he knew of the subsequent conveyance from Willis and from Morrison and wife to the company does not appear. As nothing was said of it I shall assume it now not to be in dispute.

What, then, is the effect of the second and third mortgages under the terms stated in the above proposition?

There was no mistake in taking them in that form, because the solicitors of the company knew of the deed to Willis for the wife before they took their second mortgage, and they marked in the margin of the entry of that deed in the abstract of title sent to them, "This amounts to nothing," shewing plainly they did not regard it as a binding conveyance, and that they took the mortgage just as it is, notwithstanding that deed. Mr. Jones, one of the solicitors of the company, treated it as a voluntary deed, and no doubt if it be so considered, and I think it should be so considered, the mortgage, which she executed in respect of her dower only, may be enforced against her and her husband, notwithstanding the deed, just as if it had not been made.

There is no difficulty in dealing with this deed in that manner so far as the husband and wife are concerned, even if the deed from them and Willis had not been made to the company. The difficulty arises from the plaintiff not having had notice of the deed to Willis for the wife being a voluntary deed, and not having had notice that Willis and the husband and wife had conveyed to the company.

But I think that difficulty is overcome by the fact that the plaintiff had express knowledge of the three mortgages of the company, and took in fact subject to the claim of the company upon them, and knew that the company claimed their whole debt against the land, because they had the legal estate by their first mortgage, and he knew also of there being a defect, according to the information expressly communicated to him by Mr. Kellar, in the title of the company by their second and third mortgages.

These facts bind and affect him as a subsequent mortgagee, in my opinion, in respect of title, but more especially, which is much to the same effect, in respect of the state of accounts between the company and Morrison and his wife also. The three mortgages represent the one debt, and the last mortgage may be taken as the statement of accounts at the time the last mortgage was taken between the company and Morrison, and his wife also, if it be necessary, as she was cognizant of the giving of that mortgage, and executed it as releasing her dower, and may be assumed to have known the purport and effect of it; and I do not see why the like presumption may not equally be made against her in her character of assignee of the equity of redemption, if she is to be regarded as such assignee.

It was also argued that the conveyance to Willis for the wife, which bears date on May 21st, 1867, was not only voluntary but was void, because made by Morrison who, it is said, was unable to pay his debts in full, with, intent to defeat his creditors. At that time the company's first mortgage was in arrear, and in less than a year after that deed was made the husband owed the company nearly \$1,000.

If the deed to him was not a voluntary conveyance, but sustainable by the sum of \$381, which she paid towards the purchase of the land about 1862, then she was treated as a creditor of her husband, and the conveyance would be liable to be impeached on the ground of its being a fraudulent preference.

These transactions between husband and wife are, when creditors are concerned, to be narrowly watched, and the real consideration for that deed is that which was stated by the husband in his evidence: "I was in pecuniary difficulty from losses and sickness. Glover was a brother-in-law of mine, and he advised me to secure it for the family."

The conclusion I come to is that the deed from the husband to Willis in trust for the wife of the grantor was a voluntary conveyance, made while the grantor was unable

to pay his debts in full with intent to defeat his creditors, or if the wife can be held to have been a creditor of her husband that it was a fraudulent preference, and made with the like intent, and in either case it would not avail an innocent purchaser: that the knowledge which the plaintiff had before and at the time of his purchase of the mortgage from David Glover, of the defect of title of the company under their second and third mortgages by reason of the husband being the mortgagor instead of his wife will, as a matter of title, while the legal estate was vested in the company, enable the company to maintain their priority in respect of these two mortgages as against the plaintiff: that the second and third mortgages being executed as to dower by the wife of the original mortgagor will, while she professed at these times to be the assignee of the equity of redemption, constitute her a party to the accounting which took place with the company in respect of the debt continuing, and continued from the first mortgage [all the three mortgages representing this one debt] and bind her in her character as assignee of the equity of redemption, if she is to be considered as properly and effectually filling that character. And whether the company's title is maintained against the plaintiff or their original mortgage is to be held to cover the debt acknowledged to be due to them by the third mortgage, is of no practical consequence; the plaintiff acquired his title with a knowledge that the company claimed a debt represented by the three mortgages, and took it subject to such claim of the company.

The decree will be drawn in accordance with my judgment, and that the plaintiff do pay to the company their costs of the action.

[COMMON PLEAS DIVISION.]

GARSON V. GARSON.

Agreement between father and son—Specific performance.

The defendant in 1871 wrote to his son, who had left home to work for himself, that if he would return he would give him 50 acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times when he went away to work for wages for himself. It was proved that the father had pointed out the 50 acres which he intended to give his son, and the son entered and erected a house thereon with his father's approval, and occupied it with his family, he having married in 1879. *Held*, that the plaintiff was entitled to specific performance of this agreement.

THIS was an action tried before Cameron, J., and a jury at Owen Sound, at the Fall Assizes of 1882.

The statement of claim was, firstly, for the specific performance of an alleged agreement; and secondly, that if for any reason the plaintiff should not be entitled to specific performance of the alleged agreement, that he might be paid wages for work and labour performed by him for the defendant extending over a period of many years.

There was a great dispute at the trial as to whether or not the defendant had promised to make an assignment of his rights to fifty acres of land occupied by him to the plaintiff, the plaintiff asserting that he had done so by a letter (which had been destroyed) written in 1871, which the defendant denied ever having written.

After the learned Judge had charged the jury, they returned into Court "with a verdict for the plaintiff to give him a transfer deed of fifty acres."

The learned Judge said: "You say the letter was written containing the statement that the plaintiff says." FOREMAN—"Yes, my Lord, we think the letter was written: that the letter was an inducement to the young man to come home on account of this fifty acres, and we think that he has wrought on the place, and that the work that he

wrought off it, in fact we think that a good part of it went to the benefit of the home." JUDGE—"What do you find to be the meaning of the letter; when was he to get the deed?" FOREMAN—"We thought that he was to get the deed when he would get married." JUDGE—"That was the time the performance was to take place?" "Yes, my Lord." JUDGE—"And you find that he did work up to that time?" "Yes my Lord." JUDGE—"Did you consider that would be the value of his services supposing he was not to get the deed?" "Yes my Lord, we talked that over, we thought that he ought to have at least six hundred dollars."

The learned Judge deferred giving judgment, and subsequently gave judgment in favour of the plaintiff.

The following is the judgment of the learned Judge:

CAMERON, J.—Upon the evidence I do not think the finding of the jury, that the defendant agreed in consideration of the plaintiff returning home after he left him to give him fifty acres of land, was established. The plaintiff's account of the letter said to have been received from his father was not satisfactory, and he did not after his return home say anything immediately about the contents of the letter.

I think, however, the defendant intended to let his son have fifty acres of land to work on his own account, and afterwards promised to give him the land, though not in consideration of any agreement to do so if the son would continue to work for him. The father (the defendant) was not the absolute owner of the land, the fee being still in the Crown, and I think it unlikely that he promised to make his son (the plaintiff) either a transfer of his interest in the fifty acres or a deed at any specified time such as his son's marriage.

The defendant was a very bad witness, and gave his evidence in a very unsatisfactory manner, and left an unfavourable impression on the jury; but he was a stupid kind of man, and, having no doubt as a fact told his son he would give him the land, was unable to see the differ-

ence between such a promise as an act of grace and favour, and a contract to do so for the consideration that his son would work for him after he came of age; he was therefore embarrassed in his answers and presented the appearance of wishing to conceal the truth. In the letter, assuming it to have been written, no land was described, and on the facts the case of *Jibb v. Jibb*, 24 Gr. 487, would seem to be clearly against the plaintiff's right to a decree for specific performance; but I presume I am bound by the finding of the jury that the agreement set up by the plaintiff was made by the defendant, and have decreed specific performance accordingly.

On the evidence I think the plaintiff worked more for himself than his father, and the verdict for \$600 was not warranted; but that will not be important if it should be found the plaintiff is entitled to the deed or transfer of the land.

I did not give judgment at once, as I thought I might, notwithstanding the finding of the jury, in such a case give judgment for the defendant; but on reflection think I must be governed by the finding and leave the defendant to move for a new trial.

At the Michaelmas Sittings, *J. E. McDougall*, on behalf of the defendant, obtained an order *nisi* to set aside the verdict and judgment for the plaintiff, and for a new trial.

A notice of motion against the said judgment was also given.

During Easter Sittings, June 8, 1883, *Shepley* supported the order *nisi* and motion. Only two questions could be submitted to the jury. 1. Was the alleged contract made in 1871, and 2nd, did the plaintiff change his position in consequence? The evidence is not satisfactory that the letter was ever written. But assuming the letter to have been written in the words the son says it was, the Court will not enforce specific performance of such an agreement. The letter was not a sufficient memorandum within the Statute of Frauds. No specific subject matter is identified,

for no specific fifty acres is mentioned, and there is no evidence that a selection was ever made. There is no proof that the father signed the letter: *Browne* on the Statute of Frauds, 4th ed., p. 471, sec. 385; *Fry* on Specific Performance, 2nd ed., pp. 223, 225, 229. Even if sufficient under the Statute of Frauds, the Court will not enforce the contract for want of mutuality. The consideration on the part of the son being the performance of personal labour, the contract is not enforceable: *Fry* on Specific Performance, p. 201-4. It also will not be enforced, as being something to be performed at a future time: *Fry* on Specific Performance, p. 361. It was also a mere treaty for an agreement, and was never acted upon. The son did not come or work in consequence of the letter, for the evidence shews that he worked on his own account for other people. There was therefore no part performance. The part performance must be referable to the contract: *Fry* on Specific Performance, p. 252. Everything that was done by the son was consistent with the relationship of father and son, and cannot form a claim for specific performance. The cases of *Orr v. Orr*, 21 Gr. 397; *Jibb v. Jibb*, 24 Gr. 487, are conclusive in the defendant's favour. There can be no claim for wages. In every case an express contract for wages must be proved, unless one can be implied from the circumstances, but in case of a near relative the contract must be express, and no contract was proved here: *Addison* on Contracts, 8th ed., p. 436; *Rex v. Inhabitants of Stokesley*, 6 T. R. 757. There has been a delay of three years, and the plaintiff has lost any claim he ever had by his laches: *Fry* on Specific Performance, p. 477.

Falconbridge, contra. No question now arises as to whether the letter was written or not, as the jury have expressly found that it was written. As to the Statute of Frauds, the subject matter was sufficiently identified. The plaintiff had the right of election as to which fifty acres he would take. It is clearly laid down that the uncertainty of description of the subject matter may be got over by

the election of one party to the contract where the effect of the contract is to give such election. The contract here has given the right of election, and the plaintiff made his election, and built a house upon the land ; and as to the father's signature the Court under the circumstances will assume it : *Fry* on Specific Performance, p. 146, 147. As to mutuality. The performance by personal labour is sufficient : *Fry* on Specific Performance, p. 203, 205. The plaintiff did not rely on the bounty of his father but worked in reliance on the contract. The wages he earned off the place he put into the place : *Fry* on Specific Performance, p. 253. The place was assessed in the son's name, with the father's knowledge. There were no laches, as the son lived on the land and was never interfered with, and it was only when he asked for a deed that this objection was set up. The case of *Orr v. Orr*, 21 Gr. 397, is clearly distinguishable. In that case there was no written evidence of any contract, and the action was brought long after the death of the mother, the owner, who was alleged to have made the promise. The case of *Alderson v. Maddison*, L. R. 7 Q. B. D. 174, contains the best expression of opinion on this branch of the law, and shews the plaintiff is entitled to recover. There was sufficient part performance. The son worked and expended his labour on the faith of the agreement : *Roberts v. Hall*, 1 O. R. 388 ; *Dashwood v. Jermyn*, L. R. 12 Ch. D. 776. As to wages, *Addison* on Contracts, and other works only lay down the principle that there must be some evidence of a contract, otherwise the Courts will assume that only the natural obligation between father and son existed. Here there was express evidence of the agreement : *Henricks v. Henricks*. 27 U. C. R. 447. The case of *Rose v. Inhabitants of Stokesley*, 6 T. R. 757, was under the settlement law, and is not applicable here. The present case went fairly to the jury, and they found for the plaintiff. In any event all that can be granted here is a new trial : *Solomon v. Bitton*, Weekly Notes, 1881, p. 164.

Shepley, in reply referred to *Humphreys v. Green*, 10 Q. B. D. 148; *Roberts v. Tucker*, 3 Ex. 632; *Stuart v. London and North-Western R. W. Co.*, 1 DeG. McN. & G. 721.

June 29, 1883. GALT, J.—We have been favoured with the learned Judge's reasons for his decision. I quite agree with him in thinking the evidence on the part of the plaintiff was unsatisfactory, but at the same time it is impossible to peruse the testimony of the defendant without arriving at the conclusion that he had made a promise to transfer the land in question to the plaintiff.

The circumstances of the case are very simple. The defendant is the occupant of lot 17, in the 18th concession of Egremont. He is not the owner, as the title is still in the Crown (at least it was so at the time the promise was made) and the plaintiff alleges that having left home in the year 1871, to work for himself, he being then about twenty-one years of age, he received a letter from the defendant "that if I would come home my father would give me fifty acres and the share of the cattle and sheep when I got married, and that if I would stay away that it would sacrifice my own interest besides sacrificing his." Upon receipt of this letter he returned home. The letter was not produced, the plaintiff stating he had destroyed it. The fact as to whether this letter was written was expressly left to the jury by the learned Judge, and they found such a letter had been written, and that in consequence of the promise therein contained the plaintiff returned home, and the evidence shewed he has remained there ever since, except when he would go away at certain times of the year, generally at harvest time, to earn wages.

It was also proved that the defendant had indicated the fifty acres which the plaintiff was to have, and that with the sanction and approval of the defendant he had erected a house thereon, which was occupied by himself and his family, he having married in the year 1879.

The case of *Orr v. Orr*, 21 Gr. 397, in appeal, was

relied on by Mr. Shepley, but that case differs from the present in this essential particular; there was no written evidence that the mother of the plaintiff (who died in possession of the land) ever gave or promised to give the land then in question to the plaintiff; it was a claim for specific performance of an alleged promise made years after the death of the owner, and I fully concur in the remarks made by Richards, C. J., when he says, at p. 124: "On the whole, I think it will cause great and serious mischief through this country (where so large a portion of the population are farmers owning their own land), if it is understood that conversations in the family or amongst neighbours as to how the farm is to be divided when the father dies, are to be taken as constituting, a contract which can be enforced in equity."

I think the evidence as to the written promise in the present case was unsatisfactory, but that was a question for the jury, and there can be no doubt as to the conduct of the plaintiff; he certainly has acted in entire accordance with the truth of his evidence, he has spent the best years of his life on the place, and has erected a house for himself and his family thereon; and if we were obliged to dismiss his claim to the land he would be entirely without remedy, as according to the evidence he has no claim whatever under the second ground of claim, there is no evidence of any agreement express or implied to pay wages.

WILSON, C. J., and OSLER, J., concurred.

Order discharged, and motion dismissed.

[COMMON PLEAS DIVISION.]

BENNETT V. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Track crossing on company's premises—Statutory duty—C. S. C. ch. 66, secs. 104, 144-5.

Held, that a mere track crossing, on a road or way on a railway company's own grounds for the convenience of passengers and others in going to and from the station on railway business, is not a public crossing, highway, or place, within sec. 104 of C. S. C. ch. 66, so as to subject the company to the requirements of that section of ringing the bell or sounding the whistle when approaching such crossing; but, *semble*, apart from the statute, care must be taken when starting their engines from the station.

Semble, also, that sec. 145, requiring a person to be stationed on the last car in the train, applies to the station grounds of railway companies in cities, towns, and villages, as well as to the limits outside of such station grounds.

ACTION for damages.

The declaration stated the defendants were possessors of a line of railway, and of engines and carriages, and that they so negligently and unskilfully managed the same, that an engine and train of carriages then upon the railway were so driven and conducted at and across a certain public crossing, highway and place, as to collide with a team of horses and a conveyance of the plaintiff then being lawfully upon the said public crossing, highway and place, whereby the said horses, and conveyance and harness were damaged and rendered unfit for use.

Plea, general issue, by statute. Issue.

This was a County Court case tried before Osler, J., and a jury, at Berlin, at the Spring Assizes of 1883.

The place where the accident happened was a track crossing on a road or way on the defendants' grounds at their station in the village of Georgetown for the convenience of passengers and others going to and from the station on railway business. The plaintiff was an hotel keeper at Georgetown. The plaintiff's omnibus was at the station to meet the train, and was being driven out of the station grounds along the said road with some passen-

gers from the train, and while crossing over the said track crossing the omnibus collided with one of the defendants' engines, employed in shunting cars, and was damaged.

The following questions were submitted to the jury:—

1. "Was the bell rung as Hodgson says it was?"

A. "No."

Hodgson was a witness for the defence who stated that the bell was ringing at the time of the accident and during the whole time the engine was being employed in shunting.

2. "Was the whistle sounded at short intervals at the distance of eighty rods from the crossing until the collision occurred?" A. "No."

3. "Was the engine passing at a greater rate of speed than six miles an hour?" No answer.

4. "Was there a man stationed on the last car of the train?" A. "None."

5. "Was the injury caused by the negligence of the defendants?" A. "Yes."

6. "If you say it was so caused, what was the active negligence which caused it?" A. "Failing either to ring the bell or blow the whistle at intervals, and neglecting to have a man on the rear car."

7. "Could the driver of the omnibus have avoided the accident by means of proper care?" A. "No."

The jury assessed the damages at \$135.

The verdict and judgment were accordingly entered for the plaintiff for the amount of the damages so assessed.

At the Easter Sittings of the Divisional Court, May 21, 1883, *Bethune*, Q. C., obtained an order *nisi* for the defendants, calling upon the plaintiff to shew cause why the verdict rendered for the plaintiff should not be set aside, and a judgment be entered for the defendants; or why a new trial should not be had, on the ground that the verdict and judgment given for the plaintiff were against law and evidence, and for misdirection of the learned judge, in directing the jury that the crossing at which the accident happened was a highway, and on the ground that there was no evidence of

negligence to go to the jury, and that the plaintiff was guilty of contributory negligence; and the finding of the jury that there was no contributory negligence on the part of the plaintiff was against evidence, and the weight of evidence.

The defendants served a notice of motion in respect of the alleged misdirection.

During the same sittings, June 1st, 1883, *Bethune*, Q. C., supported the order *nisi* and motion. The declaration was framed as for neglect committed on a highway. The place in question was on the defendants' own private grounds, for the convenience of passengers and others in going to and from the station on railway business, and was in no sense a public crossing or highway. The defendants were not required by statute to give any warning, or any particular kind of warning, while they were moving their trains or carriages upon their own grounds, and they were not bound to ring the bell of the engine, or to sound the steam whistle in such a case. These and the not having a man on the rear car while going backwards, the omission of which the jury found against the defendants, were the only acts of omission for and upon which they found their verdict. He referred to C. S. C. ch. 66, sec. 104, secs. 144-145, and to sec. 7, sub-sec. 12. The plaintiff was clearly guilty of contributory negligence.

Fullerton, and *Schoff*, shewed cause. The place was a highway within the meaning of the Railway Act. The Railway Act defines highway to mean any public highway, crossing or place. This was a way which the public were invited to use, and, therefore, a public way within the meaning of sec. 104 of the Act. The definition of a highway given in *Harrison's Municipal Manual*, 4th ed., p. 475, sec. 489 and notes, shews that this was a highway. In any event under secs. 144, 145 the railway company are required to give warning while going through the village, and therefore, even although the place in question was the defendants' own private land, they were bound to give warning. But apart from the statute, this was a danger-

ous place, and warning should have been given. There was no contributory negligence. The plaintiff drove in the usual way the public drove, and it was a most unusual thing for the defendants to use the siding in the way they did. They referred to *Bender v. Canada Southern R. W. Co.*, 37 U. C. R. 25; *Ham v. Grand Trunk R. W. Co.*, 11 C. P. 86; *Shields v. Grand Trunk R. W. Co.*, 7 C. P. 111. *Bethune*, Q. C., in reply.

June 29, 1883. WILSON, C. J.—This last is the fourth trial of this cause. There was a verdict at one time for the plaintiff; once he was nonsuited; upon one occasion the jury failed to agree, and now there is a verdict again for the plaintiff.

The declaration is in the most general form, alleging negligent and unskilful management by the defendants of their railway, engines, and carriages at and across a certain public crossing, highway, and place, so as to do damage to the plaintiff's horses, conveyance, and harness, then being lawfully upon the said public crossing, highway, and place.

The Railway Act, C. S. C. ch. 66, sec. 7, subsec. 12, says: "‘Highway’ shall mean all public roads, streets, lanes, and other public ways and communications."

The R. S. O. ch. 165, sec. 3 subsec. 6, gives the like definition; and the Municipal Act, R. S. O. ch. 174, sec. 2, subsec. 8, says: "‘Highway,’ ‘Roads,’ or ‘Bridge,’ shall mean a public highway, road, or bridge respectively." In these Railway Acts the expression *public* means roads, &c., which the public have the right to use, or it may be which the public generally use, but not a roadway or communication in the company's own station grounds. A *public* house of entertainment, or a *public* dancing house, is a place where persons generally have the right to resort upon certain terms, as the payment of money: *Marks v. Benjamin*, 5 M. & W. 565.

But railway premises are not a "public street or road," so that a carriage which is there with the assent of the railway company, waiting for passengers who come by

train, cannot be compelled to accept a hire from one who has not come by train.

It is said by Kelly, C.B., in *Case v. Storey*, L. R. 4 Ex. 319, at p. 323: "Railway stations * * are private property; although it is true they are places of public *resort*, that does not of itself make them public places. The public only resort there upon railway business, and the railway company might exclude them at any moment they liked except when a train was actually arriving or departing. For the proper carrying on of their business they must necessarily open their premises, which are nevertheless private, and in no possible manner capable of being described as public streets or roads."

Channell, B., said, at p. 325: "But the street or place meant must be a street or place where both the driver and hirer may lawfully be. * * The cabman had no *right* to be on the railway company's premises. He was allowed to be there by the company for the accommodation of the public who might happen to be passengers by the trains. Then, again, the person who claimed to hire the respondent had no right to be on the railway premises at all."

By the Municipal Act a highway, road, or bridge, as therein defined, mean still more restrictedly a highway, road or bridge which the public have the right to use.

It cannot be that railway companies are required to ring the bell or sound the whistle whenever their track crosses a road into or out of or along their yard or station grounds, even although the public use such road, and are intended by the company to use it, for the public convenience and for the interest of the company. They cannot be required to do so under section 104, because that does not apply to such roads, and because the person in charge of the engine has not in most cases of the kind eighty rods space before crossing such a road, at which to begin to sound the bell or whistle.

It does not follow, however, that because the company's engines are not obliged to give the statutory warning of sounding the bell or whistle in moving about on their

own grounds, they are not bound to give any warning. The statute does not require warning to be given by the engineer on starting his engine from the station, yet he must make sure there is no danger in starting without warning, before he does start. If he start when he has reason to believe there will be danger in doing so without warning, or if he do not know whether it will be safe or not to start without notice, he will be answerable just as the driver of an ordinary conveyance would be answerable if he drove off without regard to any danger there might be in starting, without looking what he was about, or making sure there was no danger in his way. The case referred to of *Bender v. Canada Southern R. W. Co.*, 37 U. C. R. 25, applies to this part of the case.

I think that section 145 of the Act applies to the station ground of railway companies in cities, towns, and villages, as well as to the limits without such station grounds in such like towns and villages. Trains moving reversely, that is the locomotive being in the rear, are far more frequently so used in the station grounds than outside of them, and persons are more frequently standing on or crossing the track of the railway in the station grounds of the company in cities, towns, and villages, than outside of such grounds in cities, towns, and villages; and there is no reason why a distinction should be made between one part of the city, town, or village, and another part of it, unless indeed greater stringency should be imposed upon companies in those parts—their own grounds—where they are the most frequently moving reversely. In moving reversely in all parts of cities, towns, and villages the company should have a man “on the last car in the train, who shall warn parties standing on or crossing the track of the approach of such train”: Sec. 145.

The question I have so far been considering is, whether the plaintiff has described the locality correctly by representing the defendants to have driven their engine and carriages so negligently and unskilfully at and across a

certain *public* crossing, *highway*, and place, which caused damage to the plaintiff.

From what I have said, I am of opinion the locality in question, a mere track crossing on the company's own grounds for the convenience of passengers and others in going to and from the station on railway business, is not correctly described as a public crossing, highway, and place, nor as a highway. It would not be sufficient, I think, to describe it as a common crossing or place, for it is not common, that is, usable by all persons, but only for the use of those going to and from the station, railway offices, and trains on railway business..

Whether the plaintiff should be allowed to amend his declaration now, is the question. The case was argued before us that the declaration is right as it is, and the plaintiff's counsel did not, and, as I understand, did not desire to amend, although objection was taken to it; and upon the pleadings as they stand the defendants, under the general issue, should have had a verdict upon that allegation.

I confess I am not in favour of helping the plaintiff when he deliberately refused to amend, because I do not take a very favourable view of his case upon the merits.

I think the verdict might be entered for the defendants upon that ground; but if that be not done there must be a new trial; and that is the course my learned brothers think it better to adopt, and in which I shall also agree.

We shall not, therefore, say anything more of the merits of the case than is necessary to explain why we make the order absolute for a new trial without costs, and that is that the verdict, in our opinion, is so opposed to the evidence that it cannot be sustained.

The order will therefore be absolute, without costs.

OSLER, J.—The answers of the jury are utterly against the weight of evidence on the question of contributory negligence at all events; but I do not see how we can interfere as to this except by granting a new trial, without costs.

I doubt if we ought to refuse the amendment merely because the jury have not done what is right as to the other part of the case. Clearly, the evidence supports the amendment in this: that the plaintiff was lawfully on the place in question, that is, by consent and permission of the defendants,

If the defendants think it worth their while to accept another trial, without costs, I think they ought to have it.

GALT, J., concurred.

Order absolute.

[COMMON PLEAS DIVISION.]

LUCAS V. KNOX.

Dower—Quarantine—Right to companion and attendant—Evidence—Trespass.

Held, that the right of a dowress to occupy the mansion house during her days of quarantine is not merely a personal right, but that she is entitled to have reasonable and proper attendance and companionship, and an action will therefore lie for the eviction of such companion or attendant.

ACTION for assault.

Justification: the removal of the plaintiff from the defendant's house and premises; and issue joined

The cause was tried before Armour, J., and a jury, at Belleville, at the Spring Assizes of 1883.

The facts so far as material are fully set out in the judgment.

After the evidence had been given it was agreed that the jury should assess the damages on the assumption that the defendant had no right to order the plaintiff out, and that the learned Judge should then determine the question on the facts and law applicable to them as to such right, drawing such inferences of fact as he might reasonably and properly draw from the evidence, and that the Court on appeal from him might draw like inferences.

The jury assessed the damages at \$50.

The following is the judgment of the learned Judge.

ARMOUR, J.—I find that the plaintiff was in the house by the invitation and with the consent of the widow, and as a mere companion to her: that the defendant ordered her out, and that she refused to go out, and that he put her out, using no unnecessary force for that purpose; and the only question is, had the plaintiff a right to remain in the house under the privilege the law gives to the widow of remaining in her husband's house for forty days after his death, she being there by the invitation and with the consent of the widow as a mere companion.

In *Coke*, 1 Inst. 32 *b*, it is written; "But some have said that by the ancient law of England the woman should continue a whole year in her husband's house, within which time if dower were not assigned she might recover it; and this certainly was the law of England before the Conquest. But by Magna Charta ch. 7, it is provided: "*Vidua post morte mariti sui * * maneat in capitali messuagio mariti sui per quadraginta dies post obitum mariti sui, infra quos dies assignetur ei dos sua * * et habeat rationabile estoverium suum interim in communi*; and the word *estoverium* here means sustenance: 2 Inst. 16; "If the wife marry withing the forty days she loseth her quarantine, for her habitation in the house is personal to her, and only given to her in judgment of law during her widowhood, albeit the words of the law be general: *Co. Litt.*, 34 *b*.

In *Bacon's Abridg.* Dower (B.) Quarantine, it is said quarantine is a privilege the law allows to women to continue in the capital messuage or mansion house, or some other house whereof they are dowable, forty days after their husband's death, whereof the day of his death is counted one; and during this time they are to be provided with all necessaries at the expense of the heir, and before the end thereof to have their dower assigned to them. This privilege is conferred by Magna Charta, ch. 7, and

seems to be only a compliance with that decency and ceremony which custom has introduced upon so melancholy an occasion, that widows, who are supposed to be under great affliction, may not be forced to appear abroad, and be put to their shifts for a maintenance; and for this reason, if they marry within the forty days, their quarantine ceases, for then they have provided for themselves, and their sorrowful condition is supposed to be at an end."

In *Callaghan v. Callaghan*, 1 C. P. 348, Macaulay, C. J., says, at p. 352: "With respect to the widow's quarantine, I do not find authority for holding her entitled to more than a right to reside in the dwelling house concurrently with the heir, and to receive her reasonable maintenance during forty days after her husband's death." See *Park on Dower*, sec. 250, p. 114; F. N. B. 162.

I gather from all this that the right of quarantine is a privilege personal to the widow: that the plaintiff had no right to be in the dwelling house under this privilege against the will of the defendant, and that her ejection was rightful; and I therefore dismiss the action, with costs.

During Easter Sittings, May 23, 1883, *Arnoldi* obtained an order *nisi* to set aside the verdict for the defendant, and to enter a verdict for the plaintiff for the amount assessed.

During the same sittings, May 31, 1883, *Arnoldi* and *Burdett*, (of Belleville), supported the order. The question is as to the right of a widow under her possession under quarantine. The result of the authorities seems to be, that the right of the widow is a personal right, that is, it is a right personal to herself in the sense that she cannot assign it over to another; but it is not a personal right in the sense that she must dwell in the principal mansion alone, and be deprived of the society of friends. She is entitled to such an establishment as is necessary to her station in life, and to necessary attendance: *Bacon's Abridg. Dower* (B.), *Quarantine*, p. 715; *Park on Dower*, sec. 256, p. 114; *Twiss's Bracton*, vol. 2, pp. 81, 85; *Scribner on Dower*, ed. 1864, secs. 14-16. The

plaintiff is entitled to the society of her sister, and particularly so here as a comfort and protection to her after the threats the heir had made against her. The next point is, that the removal of the plaintiff at the time in question, taking into consideration the inclemency of the weather, was an unreasonable exercise of authority.

Northrup (of Belleville), contra. In a case in our own Courts, *Callaghan v. Callaghan*, 1 C. P. 351, where the question is considered, and in *Scribner on Dower*, vol. 2, ed. 1867, p. 49, where all the authorities are collected, the word personal is used, and it is used in the strictest sense as a purely individual right. But even assuming it has a more extended meaning, it cannot be extended further than the immediate family of the widow, and cannot mean all her relations and friends. The defendant does not deny the right of the widow to remain in the house during the forty days, but she has no right to have a mere stranger there, as was the case here. If the widow is entitled to have all her friends without limit, she might use up the estate during the forty days.

June 29, 1883. WILSON, C. J.—At the trial it turned out the plaintiff was claiming the right to be in possession of the premises under Phoebe Knox, whose title she set up.

The pleadings did not warrant such a claim by the plaintiff. The title she justifies under is affirmative matter, and should have been replied. It can in no way be admitted under a mere traverse of the defendant's title. His title was proved and is unquestionable. The title set up by the plaintiff is one not in denial of the defendant's right, but consistent and co-existent with it. He is devisee or heir-at-law of his father. The title of Phoebe Knox is as dowress of the defendant's father during her quarantine, and before the assignment of dower made to her. The two titles are derived from the same person, the possession of the dowress during that time being, like the dower when assigned, an excrescence of or from the husband's estate.

Pleading title in cases analogous to this is fully explained in all works on the subject. The plaintiff is in effect asserting title without pleading it or relying upon it.

I shall only refer to the case of *Kettillesby v. Kettillesby*, Dyer 76 b., because it is specially applicable here, where it is said, In pleading quarantine the widow must shew with certainty the period when her husband died, and the time of the forty days after.

If the widow must so plead when the action is against herself, as it is plain she must, the plaintiff, who is a stranger to the widow's title, must, if she justify under it, expressly set it up.

In digging the land adjoining the plaintiff's premises by means of which damage is done to the plaintiff's close, the defendant must justify under the title of the adjoining proprietor: *Jeffries v. Williams*, 5 Ex. 792.

There is no use in citing cases on such a point, the rule, and necessity, and good reason of so pleading are too obvious.

The plaintiff asked leave to amend his pleadings on moving her order, and as the parties made the title of the dowress both at the trial and before us the ground of contention, there is no reason why we should not adapt the pleadings to the case which both parties appeared before the jury to try, and did try.

The pleadings then being assumed to be amended, and the plaintiff must see they are amended, the question will be whether the dowress Phoebe Knox has the right during her quarantine, during which time the alleged trespass was committed, to have the plaintiff, her sister, in the house with her as a companion and assistant.

If she had, the defendant had no right to turn her away as he did. If she had not, the defendant was justified in what he did, as no excess is replied.

The source of all the law on the subject is Mag. Chart., 9 Hen. III. ch. 7, which declares that the widow "shall tarry in the chief house of her husband by forty days after the death of her husband, within which days her dower shall be

assigned her (if it were not assigned her before) * * and she shall have in the meantime her reasonable *estovers* of the common."

Estovers are said to mean sustenance. In F. N. B. 162, the writ of "*quarantina habenda*," interprets *estovers* to mean *estovers* of the goods thereof, that is, of the husband : 2 Inst. 17.

The passages in 2 Inst. 16-18 ; *Jenkins* p. 284, Cas. 16 ; *Vin. Abr.*, *Dower*, quarantine Ia, pl. 4, shew, I think, she is entitled to meat and drink during her quarantine, and so the learned Judge decided at the trial, although F. N. B. has a note in the margin to the contrary, at p. 162.

I am of opinion, from the weight of authority, the widow has the right to have her meat and drink, and other necessities, such as firing, &c., while she is so residing with the heir. See *Bac. Abr. Dower* (B.) quarantine, and *Callaghan v. Callaghan*, 1 C. P. 348, to which the learned Judge also referred.

It is is said in *Co. Litt. 34b* : "If the wife marry within the forty days she loseth her quarantine, for her habitation in the house is personal to her, and only given to her in judgment of law during her widowhood, albeit the words of the law be general."

I do not think it is there intended the widow's right is so purely personal that she cannot have any one in the house during her quarantine with her. It is intended rather to express that the widow having such right of residence can no longer claim it, when she ceases to be a widow ; and besides, if she marry again her husband's residence is her home, for if the right be held to be strictly personal the widow could not even have her children with her, although she is their natural guardian, and although they are the children of her husband in whose estate she claims her dower.

In *Co. Litt. 30 b*, it is said : "Dower, * * is for the sustenance of herself, and the nurture and education of her children." That seems to shew that her quarantine, which is in respect of her dower, and during which period dower

should be assigned to her, will enure as well for her children as for herself. It would not be reasonable to separate mother and children during these forty days when the statute presumes the dower will be assigned to her within that time. In the absence of direct authority, I am of opinion, upon the reason and nature of the relationship between mother and child, that the children of the deceased husband cannot be turned from the house of their father, but are entitled to continue with their mother while she has her quarantine.

I think the same rule must apply to her necessary servants and assistants. That her husband's children are entitled to their support along with their mother during the forty days I am prepared to decide, for the reason that the quarantine is in respect of the dower, and the dower is for the support of the children, as well as of herself.

Whether the dowress can claim also for the reasonable support of her necessary servants, I am not prepared to say. In some cases I should say she could, as if she were an invalid or aged person and could not provide for herself, and a servant or attendant were absolutely required.

I am rather of opinion, taking a favourable but reasonable view of the widow's position, that such a claim could be maintained. In any such case the owner of the freehold cannot be required to contribute more for the widow and her children or others during the quarantine than her dower would be worth when or if it were assigned to her. I cannot pretend to form or give a positive opinion upon the maintenance or support of servants in such a case, with so little, I may say, without any law to guide me, and while the practice differs so much from the maxim of the law, which is, that the law favours three things: life, liberty, and dower. It has been said however that if the law did not favour the first two of these subjects more than it does the last, there would not be much favour shewn to any of them.

In this case all that is claimed is, the right of the plaintiff to be a resident in the house with the widow, under the title and license of the widow.

That the plaintiff would have the right to call upon and visit the widow in the day time at reasonable hours and times, I have no doubt. For the widow cannot be debarred from seeing her friends at her residence, and all others upon her necessary business at reasonable hours. But that she can claim the right to have any one stay in the house day by day during her quarantine is the question. That however is too large a claim. I think, however, she has the right to have a companion, servant, or attendant, in the house with her for reasonable and proper companionship, service, or attendance during her quarantine, and that is all that I understand is claimed here; and it is and must be a question for the jury or the Judge to say whether under all the circumstances of her situation such companion, servant, or attendant, is proper, reasonable, or necessary. Here that question has been tried by the learned Judge, who was of opinion that quarantine was a privilege personal to the widow, and that the plaintiff had no right to be in the dwelling house under that privilege, and that her ejection was rightful, and he therefore dismissed the action with costs, the damages being assessed contingently at \$50.

The evidence shews the dowress had her daughter and her niece, two young women, residing with her in the house: that the plaintiff came to the house on the 2nd of January last, and remained there until the 5th of the same month, at the request of the dowress, who said she was afraid to be alone, in consequence of some difficulty between her and her step-son, the defendant, who claimed as devisee under his father's will, in consequence of the widow refusing to take under the will and electing to take her dower.

I think in that case the plaintiff was not illegally there, and upon such evidence, the question being whether it was reasonable or proper she should be there, the jury might properly have found for the plaintiff. The only question tried was, whether the privilege of quarantine was so purely personal to the widow that she could in no case have a companion residing with her, and I think the mere abstract

finding on that point adverse to the plaintiff is not a correct exposition of the law. I cannot say the dowress is prohibited from having any one to abide with her, as servant or otherwise, in every case and under all circumstances, and if she cannot be so prohibited it must always be a question in each case whether the residence of such person is necessary, or proper, or reasonable.

If the chief mansion be a castle and the widow leave it, it is said she is entitled to have "a competent house forth with provided for her, in the which she may honestly dwell." In such a case she cannot I am sure be required to dwell alone. So also if the defendant had his residence in one house, and the widow had continued in her husband's house, she would not I think be bound to dismiss her children, servants, or friends, from that house.

If we are to dispose of the case upon the mere abstract proposition of law determined by the learned Judge, the verdict should in my opinion be for the plaintiff, but if it is to be determined by the reasonableness of the plaintiff being in the house, upon the evidence I confess I feel some difficulty in determining that point, but I think the evidence will warrant a finding for the plaintiff. The defendant's conduct was apparently very harsh and unnecessary.

The dismissal of the action should therefore I think be set aside, and a verdict entered for the \$50 contingently assessed, and judgment be given for that sum, with costs.

GALT and OSLER, JJ., concurred.

Judgment accordingly.

[COMMON PLEAS DIVISION.]

COCHRANE V. BOUCHER ET AL.

Chattel mortgage—Action for seizure and sale under—Collateral security—Principal and surety—Premature sale.

H., in consideration of his relieving C. from executions against him, procured from C. and his wife, the plaintiff, a promissory note for the amount thereof, and also a chattel mortgage on the goods of both as collateral security. He discounted the note at a bank, and with the proceeds paid off the executions. Afterwards, but before the maturity of the note, and while it was in the bank's hands, claiming that there was a breach of the mortgage by the removal of certain goods which was disproved, and refusing to allow the mortgagors to redeem, he took the goods thereunder, and sold them, selling goods, beyond the amount required to satisfy the mortgage, including the plaintiff's own goods to the amount of \$137.50.

In an action by the plaintiff to recover the damage thereby sustained, the jury gave \$275.

Held, that the plaintiff was entitled to recover. 1. The note being the principal security, and the chattel mortgage merely collateral, H. could not proceed on the mortgage while the note was thus outstanding. 2. The sale was illegal by reason of the refusal of redemption. 3. Even if the sale was merely irregular in selling for a supposed breach, the plaintiff was entitled to recover the value of the excess of the goods sold, and other damages beyond nominal for her interest in the goods; and the verdict was held not excessive.

A removal of goods to justify a seizure under a chattel mortgage must be by the mortgagors or on their behalf, and not a wrongful removal by others.

STATEMENT of claim by plaintiff against defendants as executors of one Hatton, deceased.

That the plaintiff as security for the sum of \$225, for her husband, gave jointly with her husband a second mortgage to the testator on the 6th of May, 1882, upon her cattle and stock, payable in three months. The mortgage was collateral security for the payment of a promissory note dated the 6th of May, 1882, made by Irwin Cochrane, the husband of the plaintiff, payable at three months, and endorsed by the said Hatton, and the said Irwin Cochrane duly satisfied the said note, and the said Hatton was not called upon to pay the same.

That prior to the falling due of the note, and before any default had been made by the mortgagor, the said Hatton wrongfully delivered a warrant to the defendant Stapleton,

commanding him to levy upon the goods covered by the mortgage for the sum of \$225, and the costs of such levy, and on the 30th of June the said Stapleton seized the said goods, including the stock and cattle of the plaintiff, and drove the same away, and on the 8th of July sold the same, and deprived the plaintiff of them, and of the right to redeem them.

Statement of defence.

The said Hatton, besides the said mortgage, held also as further collateral security for payment of the said note a judgment of the first Division Court of the county of Peterborough, obtained by one Condon against the said Irwin Cochrane, which had been paid by Hatton at the request of the said Irwin Cochrane and the plaintiff, and which was assigned by Condon to Hatton: that although the plaintiff joined in the mortgage she was not the owner of any part of the goods therein comprised: that the mortgage contained a proviso, among other things, that if the mortgagors attempted to sell or in any way part with the possession of the goods, or of any of them, or to remove the same or any part of them out of the county without the consent of the said Hatton first had in writing, the said Hatton might take possession of the said goods and sell the same by auction, or private sale, and reimburse himself for all money due to him, and for all expenses, and pay the surplus to the said mortgagors: that Irwin Cochrane and the plaintiff committed various breaches of the proviso, and Hatton appointed Stapleton his agent to seize the goods under the mortgage, and he also delivered to Stapleton, who was bailiff of the said Division Court, a warrant of execution issued upon the said judgment of Condon against Irwin Cochrane, and directed Stapleton to levy the amount of the said judgment debt and costs: that one Campbell had a mortgage made by the said Irwin Cochrane upon the land on which the said goods were, and by the said mortgage Campbell had power to distrain the goods on the said land for arrears of interest upon the said mortgage, and there was then an arrear \$67.50 for interest, and the said

Campbell appointed Stapleton his bailiff to make a distress for the said interest: that in pursuance of the said warrant of execution, and the said warrant of distress, Stapleton seized and sold the goods in the chattel mortgage comprised, and these goods and chattels of Irwin Cochrane, and out of the proceeds thereof paid the said Hatton and the said Campbell the amounts of their respective claims, after which there remained in the hands of Stapleton the sum of \$224, or thereabouts, which money while in the hands of Stapleton was seized by the sheriff of the county of Peterborough under an execution at the suit of one Malcolm Campbell against the said Irwin Cochrane, and to which sum the Hamilton Provident and Loan Society claim to be entitled under a chattel mortgage comprising a large quantity of the goods and chattels seized and sold as aforesaid, made by the said Irwin Cochrane to the said society for securing \$500 and interest, and which said sum and interest were due and owing to the society at the time of the said sale. And the defendants say the said Campbell or the said society was and is entitled to the said sum of \$224, and not the plaintiff: that in case the said Hatton was or the defendants are liable for any amount in respect of the said premises, the defendants claim to retain a sufficient sum in payment of a bill of costs amounting to \$45, or thereabouts, due and owing by the said Irwin Cochrane and the plaintiff to the firm of Hatton, Hatton & Beck, of which the said Hatton was a member.

In the event of any sum being found to be due to the plaintiff, the defendants pray the estate of the said Hatton may be administered in this Court.

Issue.

The cause was tried at the last Spring Assizes before Wilson, C. J., and a jury.

The questions submitted to the jury at the close of the evidence, were with their answers, as follows:

1. Were any of the goods in the mortgage to Mr. Hatton mentioned the goods of Mrs. Cochrane? Yes, all but the colts.

2. Was the note for \$225 in default, or was the mortgage money in default, at the time of the seizure or sale of the goods claimed? No.

3. Did the plaintiff or her husband attempt to sell the goods, or any of them, or to part with their possession or any of them or to remove them or any of them out of the county, without Mr. Hatton's consent, at any time before the seizure or sale? No.

4. Did the plaintiff or her husband consent to the seizure or to the sale of the goods in question? No.

If you find for the plaintiff what damages do you allow to her, (the goods which she claims having produced at the bailiff's sale \$160)? \$275.

Upon which findings the verdict was entered for the plaintiff, and for the said damages, and judgment was thereupon given for the plaintiff, with costs, and the estate of the said Hatton was ordered to be administered in this Court.

At the Easter sittings of the Divisional Court, May 25th, 1883, *Moss*, Q. C., obtained an order *nisi* calling upon the plaintiff to shew cause why the verdict should not be set aside, on the ground of misdirection, and non-direction. 1. The Chief Justice improperly directed the jury, that if neither the plaintiff nor her husband had anything to do with the removal of the colts in the mortgage mentioned from the county, the mortgagee was not entitled to treat the removal as a forfeiture entitling him to seize the goods covered by the mortgage. 2. And also that because the mortgagee held a note made by the plaintiff and her husband for the amount secured by the chattel mortgage, and which had been discounted by the mortgagee, and was not due at the date of the seizure and sale, the mortgagee was not entitled to enforce the said mortgage. 3. And the Chief Justice improperly left it to the jury to say whether the holding of a note and discounting it under such circumstances was payment of the mortgage, so as to disentitle the mortgagee to proceed on the mortgage, this

being a matter of law, and not one of fact for the jury. 4. And he also improperly directed the jury that they might, in the event of their finding in favour of the plaintiff, award her the value of the goods as damages, whereas he ought to have directed them that she could only recover to the value of her interest in the goods, and for the damage done to such interest. Or why there should not be a new trial on the ground of excessive damages, or why the verdict should not be reduced to the sum of \$50, being the amount of the value of the interest of the plaintiff in the goods.

A notice of motion was also served on behalf of the defendants, on the ground that the judgment directed to be entered is wrong, by reason of the finding being wrongly entered with reference to the finding of the jury upon the questions submitted to them, and upon the ground that the judgment should be reduced by the sum of \$225, the amount of the chattel mortgage and promissory note, and being the amount of interest of the said Hatton in the said goods.

During the same sittings, June 5, 1883, *Moss*, Q. C., supported the order *nisi*, and notice of motion. There was misdirection in the learned Judge charging the jury that removal of the goods within the terms of the mortgage must be a removal by or on behalf of the plaintiff or her husband. The intention of the mortgage is to provide against any removal; also in stating that the fact of the note being outstanding and not due would prevent the mortgagee from enforcing his security. It would have no such effect as it was merely collateral. And also in stating that the discounting of the note under the circumstances amounted to payment of the mortgage. This was a matter of law, and not of fact for the jury. The direction of the learned Judge, and the finding of the jury, as to the value of the goods is clearly wrong, as all she is entitled to recover is her interest in the goods after allowing for the interest of the mortgagee in them. The only interest therefore she had was the value of the goods after payment

of the mortgage. The evidence shews that she had no interest in the goods. The damages, in any event, should be reduced by the sum of \$225, the amount of the mortgagee's claim. He referred to *McAulay v. Allen*, 20 C. P. 417; *Massey v. Sladen*, L. R. 4 Ex. 13; *Russell v. Butterfield*, 21 Wendell 300; *Bramwell v. Eglinton*, 5 B. & S. 39; *Bingham v. Bettinson*, 30 C. P. 438; *Williams v. Stern*, 5 Q. B. D. 409.

Lash, Q. C., shewed cause. The principles of law laid down by the other side are no doubt quite correct, but this case is distinguishable. The plaintiff was merely a surety for her husband, and she was discharged by what Hatton did. Moreover, the surety is entitled to have the property of the principal sold first, and there was enough sold by the testator of the property of the principal to have paid the debt of \$225: *Brandt on Suretyship*, secs. 204, 205. The cases cited on the other side are cases in which the debt was due by the person whose goods were sold, and not like this case, in which the goods sold were the goods of a third person, the surety. He referred also to *Polak v. Everett*, 1 Q. B. D. 669, 672; *Flint v. Bird*, 11 U. C. R. 444; *Grantham v. Severs*, 25 U. C. R. 468.

Moss, Q. C., in reply.

June 29th, 1883,—WILSON, C. J.—The evidence shewed the testator relieved Irwin Cochrane from two executions issued from the Division Court which were in the bailiff's hands, one was Condon's execution for about \$160, and Hatton's execution for about \$26. The two sums did not exceed \$190. The way Hatton relieved Cochrane from the bailiff's pressure was by taking an assignment of these judgments, or of Condon's judgment at any rate, and by taking a chattel mortgage from Cochrane and his wife, the plaintiff, for payment of \$225, as collateral security for the payment of the promissory note given at even date with the mortgage. How that larger sum was made up did not appear. The promissory note was made at three months for the \$225, payable to Hatton, who endorsed it, and dis-

counted it at the bank and so raised the money and paid the executions—that is, without advancing anything himself he procured the money on the security of the executions, and of the chattel mortgage, and of the promissory note of Cochrane and his wife, and on his own endorsement.

That arrangement was perfected on the 6th of May. Before the lapse of two months, while this note was still outstanding in the possession of the bank, Hatton gave the bailiff a warrant under the terms of the mortgage to make the \$225, upon the ground that a pair of colts, part of the property mentioned in the mortgage, had been removed by the mortgagors out of the county of Peterborough without his, Hatton's, consent. The colts had been removed by the son of the mortgagors, who claimed them as his property, but the jury found the mortgagors had nothing to do with such removal. They did however induce their son to bring the colts back, and they were then seized with the rest of goods.

At the time Hatton gave the warrant under the mortgage he gave to the bailiff an execution upon the Condon judgment.

When the bailiff seized he got from Mr. Dumble a warrant on behalf of his client, Mr. Campbell, to levy on Cochrane's goods for arrears of interest on a mortgage Cochrane had given to Campbell. The arrears were \$67.50.

Stapleton had then in his hands Hatton's warrant under his mortgage, and Condon's execution, and Campbell's warrant, amounting in all to \$292.50. Stapleton had also however verbal instruction from Mr. Dumble to sell all the goods and chattels on the place belonging to Cochrane and his wife, and after paying off Hatton's claim of \$225, and Campbell's claim of \$67.50, to hand the balance over to him, that is to Dumble; and accordingly Stapleton sold goods which produced at the bailiff's auction sale \$594. Of that sum he paid to Mr. Hatton.....\$240 00

And his expenses were..... 62 65

\$302 65

And he paid over to Mr. Dumble \$291.35. And after that Mr. Dumble having obtained a judgment against Cochrane upon his mortgage to Campbell issued an execution, and gave it to the sheriff, and having laid the \$291 35

on a desk in his office, less the	
above	\$67 50
and less some other sum not	
explained of	16 10
	<hr/>
	83 60
	<hr/>
leaving	\$207 75

he sent for the sheriff and told him to seize that money under Campbell's execution, which the sheriff did, and that sum is now in litigation, between Campbell and the Hamilton Provident Loan Society.

It rather appeared that Hatton and Mr. Dumble were acting together in these proceedings. Or perhaps I should say there was a very strong inference they were so acting. The evidence of Mr. Argue, the brother of the plaintiff, upon that point is as follows. It related to a conversation he had with Mr. Hatton, which was not altogether corroborated, but was not objected to: "He (Hatton) said he would call in Mr. Dumble and make it known to him what he, Hatton, was going to do (that is that he, Hatton, was going to sell,) and that he would take charge of all the stuff himself, and he would make them (the plaintiff and her husband) a good bit of money out of it, far more than what the bank would, and for them to have nothing to do with the company. He would make a proposal to Mr. Dumble of what he was going to do. He would make a good deal more out of the farm and stock than they could, and if they would not go their full value he would make them go their full value, that he would buy them himself and put them to their value, and he would do the same by the farm. He said too there are some other claims too, and I will sell. I was the last at the house, and moved the things out, and when I came to town I handed the key to Mr. Dumble. Mr. Hatton said it did not make any difference, to hand the

key either to him or to Mr. Dumble. Mrs. Cochrane said to Mr. Hatton it was very tough for her and her daughter to be turned to the road to make a living."

The following part of Mr. Argue's statement is corroborated by Mrs. Cochrane. Argue said: "After the seizure and before the sale I talked to Hatton about lifting this mortgage. He said he would not give it to me. Mrs. Cochrane was there; he said there are some other claims and I will sell," and, Mrs. Cochrane said to Mr. Hatton: "My brother offered to lift the mortgage if they would give back my cattle, and Mr. Hatton said no, he should not. That was a few days before the sale. My brother was going to redeem the stock, but Mr. Hatton said no. Hatton said he would sell this stock, but he would let me have the household furniture. That is just what he said."

If Mr. Hatton would not allow the plaintiff to redeem her property, as it is sworn against him, but insisted on proceeding to a sale of it, which both the plaintiff and her brother assert he did, he must be answerable for the gross abuse of power which he exercised under his mortgage and execution; and if, as the evidence warrants us in believing, he was acting with Dumble in selling off the whole stock, his sale was only a colourable transaction, and was not a sale made in the fair and honest enforcement of his rights, and there can be no doubt the defendant must be answerable for the full value of the goods without abatement of any kind.

So, also, if Hatton is answerable for the whole amount of the sale, \$594, the evidence shews there was of that sum produced by the plaintiff's own goods \$160, leaving the balance of \$434 produced by the husband's goods.

Now if the plaintiff were only a surety for her husband's debt of \$225, no part of her goods should have been sold, for there were far more goods of the husband, the principal debtor, sold and saleable, and so no necessity for resorting to the goods of the surety. The principle of marshalling applies in such a case: *Fisher on Mortgages*; *Pitman on Principal and Surety*, and the authorities referred to by Mr. *Lash*.

But if it be assumed that Hatton sold only under the authority he had, but wrongfully at a time before there was any breach of condition of the mortgage, what damage is the plaintiff entitled to? Should it be for the full value of the goods, or the price they sold for at the auction, or the value of her goods less the debt of \$225, from the whole sum applicable to that debt or nominal damages only?

The case of *McAulay v. Allen*, 20 C. P. 417, is an authority that the premature seizure by the mortgagee of the goods of the mortgagor, when there is no clause entitling the mortgagor to the possession of them, or even with such a clause, gives the mortgagor a right of action for such seizure only to the extent of the interest of the mortgagor in the goods after allowing for the interest of the mortgagee in them.

In *Massey v. Sladen*, L. R. 4 Ex. 13, goods were seized without a proper notice, or demand of payment, and substantial damages were held to be recoverable. In *Donald v. Suckling*, L. R. 1 Q. B. 585, the sale of a pledge before the time allowed does not destroy the pledge, and the pledgee is entitled to have the amount of his lien deducted from the value of the pledge.

Halliday v. Holgate, L. R. 3 Ex. 299: the wrongful sale in case of pledge will not authorize trover to be brought, as such illegal sale does not revest the title to the pledged property in the pledgor.

The goods sold under the mortgage amounted by the auction to \$362.50, of the husband's goods \$202.50, and of the wife's goods \$160; and beyond the mortgage debt of \$225 there was sold goods to the amount of \$137.50.

There can be no reason why the plaintiff should not, if the goods had been actually sold under the mortgage, recover that \$137.50. I make no allowance for the bailiff's expenses because as between Hatton and the plaintiff Hatton had no right at that time to sell. But the plaintiff is entitled to some damages. She had an interest in the goods; they were worth to her more than the mere auction price; and as the jury allowed to her \$275 as the full value

of the goods, that is giving her \$137.50 for her interest in the goods, besides the \$137.50, unnecessarily and improperly sold after the full debt of \$225 had been provided for as stated.

It was part of the order *nisi* that I had directed the jury that by the discount by Hatton of the note there was no right to seize and sell the goods, as the note was not then due.

While Hatton held the note he certainly could seize and sell the goods before the note matured upon any breach of condition of the mortgage.

There can be no objection to Hatton discounting the note before maturity. But what seemed to me at the trial as somewhat oppressive was, that Hatton should transfer the note to the bank and raise the money upon it, and after transferring a cause of action to the bank against the mortgagors upon the note, and upon the mortgage as well, for the bank would be entitled to the benefit of the mortgage which was collateral security for the payment of the note, that he should before the note was due raise the money by a sale of the mortgagors' property under the mortgage and collect the money, and leave the mortgagors still liable to have the note and the mortgage as well enforced against them at the suit of the bank, in the event of Hatton not paying the amount of the note to the bank, for his sale under the mortgage could not preclude the bank from recovering the \$225 from the makers of the note; and I still entertain the opinion that he could not rightfully do so.

The case of *Bramwell v. Eglinton*, 5 B. & S. 39, was referred to as an authority that Hatton had the power to do so.

I think that case is not an authority for such a proposition.

There the debtor executed a bill of sale to his creditor, payable on demand by notice in writing, and the creditor at the same time drew a bill of exchange on the debtor for the like amount for which the bill of sale was given, pay-

able at four months, which the debtor accepted, and the creditor endorsed and transferred it for value, and it was outstanding and not due at the time the creditor served a written demand for payment, and seized the goods.

It was argued that the creditor, who was the defendant in that action, was not by the transfer of the bill in a condition to make a demand of payment, as there was no debt due to him. And in answer it was said the giving of the bill of exchange simultaneously with the bill of sale did not extinguish the rights under the bill of sale : *Davis v. Gyde*, 2 A. & E. 623. Blackburn, J., said at p. 49 : "At most it could only be ground for an equitable plea."

In giving judgment he said, at p. 51 : "The fact of a bill of exchange having been taken on account of the debt secured by the bill of sale would not prevent the defendant from taking possession of the goods in order to secure the lien legally vested in him. In this respect the case is extremely analogous to *Davis v. Gyde*, 2 A. & E. 623, in which it was held that the receiving of a promissory note on account of rent due did not extinguish the claim for such rent, or suspend the right to distrain for it. So, here, the bill of exchange given on account of a specialty debt secured by the bill of sale does not suspend the right to take possession under the bill of sale. Whether there would be an equitable right to stay the sale if the holder if the bill of sale proceeded to sell, we need not consider."

In that case the bill of exchange was extraneous to the bill of sale. Here the mortgage was given to secure the payment of the promissory note. There the bill of exchange was a mere simple contract debt, and at law it could not control the operation of a specialty debt, as in the case there referred to, and as in *Baker v. Walker*, 14 M. & W. 465, where a note was given for a judgment debt.

^a Here the promissory note is the principal debt, and the specialty is given only to secure payment of the simple contract.,

And even in that case it was intimated that the transfer of the bill of exchange might afford an answer to the action

if it were pleaded as an equitable defence. If it be an equitable defence it is now, by the Judicature Act, a full and legal answer to the proceedings which were taken by Hatton.

I am of opinion, then, (this promissory note being the principal liability, and the mortgage a mere accessory to it and security for its payment, that the transfer of the note, and at any rate while it remained not due and outstanding in the possession of the bank as the lawful holders, disabled Hatton from proceeding upon the mortgage even if there had been an actual breach of the condition of the mortgage by the mortgagors removing their goods from the county. He was not the person entitled to payment of the note, and he had no interest under the mortgage, but upon and in respect of the note, which was then lawfully by his act in the hands of the bank. That the former doctrine that a specialty could not be controlled by a simple contract, did not before the Judicature Act apply here, for the reason already given, and it has no place now since that Act; and that the proceedings taken by Hatton were wholly unwarranted, and illegal, and that he is liable for the full damages awarded by the jury.

I am also of opinion that Hatton's conduct was illegal, and oppressive in refusing to allow the mortgage to be redeemed, and in insisting, as I think he did, in conjunction with Mr. Dumble, or without him, in selling the whole of the goods and chattels of the mortgagors for the purpose of paying this debt of \$225, and other claims, and in selling to the extent of \$594, a sum more than twice as large as there was any pretence for raising, and for such cause I think the damages of the jury are correct.

I am also of opinion that even if Hatton were merely irregular in his proceedings, selling for a supposed breach of the mortgage while none had been committed, and holding him liable only for what was done under the mortgage and executions, that his sale to the amount of \$362.50, was \$137.50, in excess of the \$225, which was the whole amount of the debt, and that the plaintiff is entitled to recover that \$137.50, and other damages for her interest in her goods,

beyond nominal damages : *Massey v. Sladen*, L. R. 4 Ex. 13 ; and I cannot say the \$275, the sum the jury have found in her favor, that is \$137.50, beyond the excessive sale, is at all too much.

I remain of opinion that the alleged removal of the goods was required by the terms of the mortgage to be a removal by the mortgagors or those acting for or under them, and that a mere wilful wrongful removal by others could not and did not constitute a breach of that condition.

The objection that I left it to the jury to say whether the discounting of the note was payment of the mortgage so as to disentitle the mortgagee to proceed on the mortgage, the same being a matter of law, cannot, even if I had done as it is said I did, be taken now ; because that objection was not taken at the trial, and it is quite settled that grounds of misdirection must be taken at a time when they may be corrected if the Judge is of opinion he is in error.

The question has not the least importance, and I do not think it is worth while to consider whether the question I left, not the one stated in the order, could or could not properly be left to the jury.

In the event of an amendment being required in any manner to meet the facts of the case, leave will be granted for the purpose to the plaintiff.

The order and notice will be discharged, with costs.

GALT, J., concurred.

OSLER, J., was engaged in holding the York Summer Assizes, and was not present when judgment was delivered.

Subsequently, on December 15th, 1883, OSLER, J., to complete the judgment of the Court, delivered judgment agreeing that the order *nisi* be discharged, and motion dismissed, with costs.

Order discharged, and motion dismissed, with costs.

[COMMON PLEAS DIVISION.]

THE REAL ESTATE INVESTMENT COMPANY V. THE
METROPOLITAN BUILDING SOCIETY.

*Sale of securities for lump sum—Deficiency in value—Misrepresentation—
Notice to solicitor—Sale for taxes—Covenant— Arrears of taxes—Costs.*

The plaintiffs negotiated for the purchase from the defendants of certain mortgage securities and other assets of the defendants on the basis of an eight per cent. investment, and a schedule was prepared by the defendants' manager exhibiting each security, amongst which there was stated to be a mortgage by F. for \$4,700; whereas in fact there was no such mortgage, but instead two mortgages on the instalment principle, which as an eight per cent. investment were worth only \$3,920, making a deficiency of \$780. This was caused by F. before the schedule was drawn up, intimating his intention of paying off the mortgages, \$4,700, being the amount agreed upon between F. and defendants, which he would have to pay and which defendants' manager therefore, in good faith, put into the schedule. Subsequently and while the schedule was in the plaintiffs' solicitor's hands to prepare and settle the deed of assignment, F. decided not to pay off the mortgages, but to go on with the regular payment of same, and defendant's manager then corrected the schedule by inserting the two mortgages. There was a difference between the plaintiffs and defendants as to the value of the securities, and finally a lump sum was agreed on and paid by plaintiffs, and the assignment executed.

Held, by OSLER, J., that on the evidence, set out below, the plaintiffs' solicitor must be deemed to have had notice of the error and alteration in the schedule before the execution of the conveyance or completion of the transaction, and that this was notice to the plaintiffs.

Seemle, per OSLER, J., that although the evidence shewed that there was no intention to deceive on the part of the defendants' manager, still there was such a misstatement of a material fact as but for the notice would render the defendants liable for the damage sustained thereby.

The defendants in the deed of assignment covenanted that the mortgages were good and valid charges on the lands, and that the defendants had not done or permitted any act, &c., whereby the mortgages had become released or discharged in part or in entirety. It appeared that certain of the lands comprised in these mortgages had been sold for taxes.

Held, per OSLER, J., that the covenant was not *ultra vires* of the company or the directors; and that the plaintiffs were entitled thereunder to recover the value of the lands so sold.

Arrears of taxes due on the mortgaged lands were paid by the plaintiffs. The taxes were due by the mortgagors; there was no covenant in the assignment against incumbrances, and no evidence of any request by defendants to pay them.

Held, that the plaintiffs were not entitled to recover the amounts so paid. The plaintiffs also claimed to recover a sum of money paid to the defendants' solicitors for costs due them; *Held*, under the circumstances not recoverable, as it was a voluntary payment.

On appeal to the Divisional Court: *Held*, as to the claim for the \$780, there could be no recovery, for that the true construction of the transaction was that the lump sum was to cover all deficiencies in value as also errors and mistakes, at all events to not an unreasonable amount, which \$780 could not be said to be; and where, as here, there was no fraud, concealment, or misrepresentation.

In other respects the judgment was affirmed.

THIS was an action tried before Osler, J., without a jury, at Toronto, at the Winter Assizes of 1883.

The action was commenced on the 23rd May, 1881, and the declaration was filed on the 22nd June, 1881.

The first count stated, in substance, that the plaintiff and defendants had been negotiating for the assignment by the defendants to the plaintiffs of certain mortgages and other securities, upon the basis of certain representations then made by the defendants that they were the holders and owners thereof, and entitled to the moneys secured thereby, and that such mortgages and securities were of the value set forth by the defendants in a schedule prepared by them and then shewn to the plaintiffs: that the defendants agreed to assign such mortgages, &c., for a consideration based and calculated upon their value as represented and stated in the schedule, and upon the amounts of money secured thereby, respectively: that, among the mortgages, the defendants represented that they were the holders of a mortgage made by one John Fee, securing \$4,700, with interest at eight per cent., payable half-yearly, which was valued in the schedule at that sum, and that the plaintiffs agreed to pay the consideration, upon the basis and relying upon the representation that the mortgage was one securing the sum of \$4,700, with interest as aforesaid, and was of the value of \$4,700, as represented in the schedule, whereas in truth and in fact the defendants were not the holders of such a mortgage, of which the plaintiffs had not notice, but were holders of two mortgages made by one Fee, securing payments of certain moneys, the principal and interest of which were payable together by instalments, and which two mortgages were then of the value of \$4,030, and no more: that

thereupon, relying upon the said representations, the defendants and the plaintiffs then agreed that the schedule contained a true statement of the said Fee mortgage, and other mortgages, and of the value of the same respectively, and the plaintiffs then paid the defendants the consideration agreed on: that in pursuance of the agreement, and relying upon the said representation, an indenture bearing date the first day of March, 1880, was prepared for execution, for the purpose of transferring and assigning the mortgages, and a new schedule was prepared, in which it was intended and understood that the then value of the mortgages was to be set forth as in the former schedule prepared by defendants, but that after such former schedule had been accepted and acted upon by the plaintiffs, and after the agreement for the sale and assignment of the mortgages and securities in such schedule mentioned, and before the preparation of the new schedule, and before the execution of the indenture, the defendants, without the knowledge of the plaintiffs, made an alteration in the schedule, whereby the two mortgages of John Fee were inserted therein, and their value was represented to be a much smaller sum than the said sum of \$4,700, which had been paid by the plaintiffs as the value and consideration of the mortgage, and the schedule so altered was annexed to, and incorporated in, and became part of, the indenture, without notice to the plaintiffs of such alteration. By this indenture the defendants assigned to the plaintiffs, among other securities, the two Fee mortgages, and the plaintiffs accepted the assignment without notice that the alteration had been made in the schedule prior to its execution. The plaintiffs say that they would not have paid the consideration paid by them for the assignment of the securities but for the representations of the defendants contained in the schedule before its alteration that Fee's mortgage was one security for \$4,700, with interest at 8 per cent., &c., nor would they have accepted the indenture of assignment, if the defendants had given

them notice of the alteration in the schedule, which alteration was made in violation of the agreement, and in fraud of the plaintiffs.

The second count set forth that under the arrangement and agreement, and by the indenture of assignment in the first count mentioned, the defendants assigned to the plaintiffs a mortgage made by them to one G. F. Gow on certain lands therein mentioned: that by the assignment the defendants covenanted that the mortgage was a good and valid charge upon the lands, and that they had not done or permitted any act, matter or thing, whereby the mortgage had been released or discharged either partly or in entirety. The breach assigned was that at the time of the making of the covenant the mortgage was not a good and valid charge upon the land, but on the contrary the said lands had been sold for taxes under the provisions of the statute in that behalf, and were not then charged with the payment of the mortgage money, the amount of which the plaintiffs in consequence lost.

The third count set forth a similar cause of action with regard to a mortgage made by one James Duncan, the breach of the defendants' covenant alleged being that fifteen acres of the land comprised in the mortgage had been sold for taxes.

The fourth count set forth a similar cause of action with regard to a mortgage made by one Thomas Symington, the breach of covenant alleged being that forty acres of the land comprised in the mortgage had been sold for taxes.

The fifth count was the common count for money paid, &c.

The statement of defence, filed on the 6th March, 1882, as to the first count, pleaded, that the second schedule therein referred to was a true statement of the mortgage given by Fee, and of the money due thereon: that just before the making out of the first schedule Fee had proposed to pay off the mortgage, and that its then redeemable value was placed by the defendants at the sum named in the first schedule, which defendants believed Fee would

pay. That afterwards and before making out the second schedule Fee declined to redeem at the price agreed on, and defendants then entered in the second schedule the amount and particulars of the mortgages as if no such assent or proposal had been made, and that in each schedule they did to the best of their knowledge set forth the true state of the facts as they then existed; and they denied that there was any fraud, concealment, or misrepresentation of any kind, and averred that the plaintiffs had full notice of the change, and signed and accepted the assignment without objection.

As to the second, third, and fourth counts they denied all breaches of covenant, and averred that the mortgages were good and valid charges on the lands, and were sufficient to satisfy the charges thereon.

As to the last count, they pleaded never indebted.

Issue.

The learned Judge after hearing the evidence and arguments by counsel, delivered the following judgment :

OSLER, J.—The facts may be shortly stated thus :

The plaintiffs were desirous of purchasing the whole or the greater part of the mortgages and other assets of the defendants, and negotiations for that purpose were carried on through Mr. Morton, the secretary-treasurer of the plaintiffs and Mr. Fraser the manager of the defendant company, in the course and for the purpose of which a statement or schedule of the defendants' assets was prepared by them from information furnished by Mr. Fraser.

This statement was appended to a joint report and valuation, bearing date the 27th September, 1879, shewing the value of the several securities as of the 1st July, 1879.

Morton said, describing the manner in which the schedule had been prepared, "I did not examine the books at that time at all. He (Fraser) read out from his books and memoranda certain facts which are entered there (in the schedule), taken down and made a statement of. It was read out to me. I never saw the books from which he ex-

tracted this. Either from the books or from memoranda which he had read out to me, and I took it down and made a valuation of what the things were worth. Then the report was made and annexed to this statement."

In the statement, among other mortgages represented as belonging to the defendants, is set forth a mortgage made by one John Fee for \$4,700, the whole amount yet to mature; time to run, five years; rate of interest 8 per cent., payable half-yearly, on the 1st January, and 1st July; valuation at 8 per cent., \$4,700; and at 9 per cent \$4,573.90.

The report and schedule were laid before the directors of the plaintiff company, and negotiations were continued during October and November. A new list was in the meantime prepared by Mr. Fraser, omitting one asset, the Yorkville and Vaughan Plank Road Company's mortgage, which the plaintiffs had determined not to deal with, shewing the valuation as of the 1st December, and giving in the first part, under different headings, very much in the same way as the former schedule, a description of the different properties on mortgage, the amount advanced on each, &c., and on a separate page in the second part a list of the lands which the defendants had for sale, and which had come into their hands either by foreclosure or otherwise.

In the first part of the schedule the Fee mortgage was again set out thus: "name, John Fee, payments to mature, 8 per cent. half-yearly; amount to mature \$4,700; total, \$4,700; discount to pay 8 per cent; net value, \$4,700." With some additional particulars as to the property mortgaged and the original valuations. It thus appeared as a single "straight" mortgage for \$4,700, with interest at 8 per cent., payable half-yearly.

The properties embraced in the schedule were valued. There was a difference of about \$5,000 between Mr. Morton's valuation and that of Mr. Fraser.

On the 17th December the plaintiffs wrote the defendants submitting a proposal to purchase the assets "as contained in the list furnished by them," the plaintiffs to

assume the liability for the defendants' deposits and to pay \$40,000 in stock of their company, either fully paid up or with fifty per cent. or sixty per cent. paid up, as the defendants' shareholders should determine. On the 24th December the defendants replied accepting the plaintiffs' offer.

The matter was thereafter placed in the solicitor's hands to prepare the necessary assignment, which was completed about the 1st of the following March, although the securities were taken over as of the 1st December.

In point of fact there was no such mortgage from Fee as was stated in the schedule, but the defendants were the holders of two mortgages made by him on the same property, on the instalment principle, one of 157 instalments of \$35.29 each, and the other of 23 instalments of \$21.25 each. During the time the solicitor was preparing and settling the assignment, Mr. Fraser altered the second schedule in pencil by inserting therein these two mortgages of Fee's, instead of the one which had already appeared therein, and by calculating their value discounted at 8 per cent. This alteration was made without Morton's knowledge or consent, and I think the proper conclusion to be drawn from the evidence of Morton, Fraser, and Caston, the solicitor, is, that Morton did not know either of the alterations or of the fact that Fee's security was in the shape of two instalment mortgages instead of a single straight mortgage until after the execution of the assignment and the close of the transaction. I am of course not now speaking of the effect to be attributed to the notice which it is said Mr. Caston acquired of the facts while he was preparing and completing the assignment. Mr. Fraser's explanation was, that before the first schedule had been made, Fee had proposed to pay off his mortgages, and was procuring a loan from another company for that purpose, and that the amount made up as due by him was \$4,700, which he had consented to pay, and that sum was therefore put in the schedule. "Ultimately, however," he says, "Fee changed his mind, and desired to go on with regular

payments as set out in the mortgages. Of course when that was the case, there was nothing left for it but to discount his mortgage at 8 per. cent, the same as the others had been."

According to this view the \$4,700 should not have appeared in the schedules as represented by a mortgage at all. There can be no doubt, however, that it does so appear, and upon the evidence I feel bound to find that Mr. Fraser, whether from oversight or momentary forgetfulness of the fact, did represent that such a mortgage existed.

The effect of the representation is thus put in Mr. Morton's evidence: "He stated certain things as facts, and I took them down as facts, the same as I would from any other building society. We agreed to pay \$40,000. It was on the valuation I made. In forming my judgment as to the value of the securities all the grounds I had were the facts as given to me for the outside properties (*i.e.* properties not in the City of Toronto). In valuing the Fee mortgage I did so on the representations made by them as to the amount remaining due and on the faith of its being a straight mortgage for \$4,700. * * I acted as the medium of communication between our company and the Metropolitan. Our company had no means of knowing as to the securities and their value, except through me."

As soon as the error was brought to Mr Morton's knowledge he made a claim on the defendants, for the loss the plaintiffs had sustained in consequence of it.

The question on this branch of the case is, whether the misrepresentation complained of is one for which the plaintiffs can maintain an action for damages. They do not seek to rescind the contract, for their position had been changed to such an extent before they discovered their injury, that a rescission would be inequitable. They are therefore obliged to rest their case on the misrepresentation of the defendants' manager. The contract has been carried out by the execution of a conveyance, and there is no covenant in the conveyance which extends to the facts, for

the defendants really had the mortgages mentioned in the conveyance and the corrected schedule, and they have been effectually assigned to the plaintiffs.

An actual intention to deceive or defraud is not imputed to Mr. Fraser, but there was nevertheless a material misrepresentation of fact as to part of the subject matter of the contract.

The declaration (filed before the Judicature Act came into force) does not allege that the representation as to the Fee mortgage was made fraudulently, nor even that the defendants knew that they had no such mortgage, but it does allege that the alteration (which sets forth the facts truly) was made in fraud of the plaintiffs.

The case must be considered in the first place as if no correction had been made in the schedule, or rather as if the plaintiffs had accepted the assignment without notice of the alteration, and under the belief that they had acquired the single Fee mortgage as originally described.

Of course if they have carried out the agreement with notice of the actual position of things they cannot now complain. Whether they had, or must be assumed to have had, such notice I will consider afterwards. The case was put to some extent, though the pleadings are not framed in that way, on the ground of a right to compensation merely, apart from misrepresentation, notwithstanding the conveyance; and the defendants relied on the general rule, that a purchaser, after the execution of the conveyance, has no remedy at law or in equity for defects relating either to the title or to the quantity or quality of the estate.

The cases in our own Courts, so far as I have seen them, are all in that direction : *McCull v. Faithorne*, 10 Gr. 324; *Follis v. Porter*, 11 Gr. 442; *Coates v. Bacon*, 21 Gr. 21. And the question is thus referred to in the second edition of Mr. Justice *Fry's* work on Specific Performance : "Whether after a conveyance has been executed and the purchase money paid, the Court has still jurisdiction to enforce compensation, is a question on which there has been some conflict of judicial opinion. It is submitted

that rights to compensation under the contract," (*i. e.*, where the original contract has made provision respecting it,) "may exist even after the conveyance and payment have been executed and made. * * Where the contract gives no right to compensation the case is, of course, different:" sec. 1250, 2nd ed. See also secs. 1251, 1252. (*a*)

The decisions which are noted under these sections are not reconcilable, but as the contract in this case does not provide for compensation, I need not refer to them here further than to quote Lord Selborne's observations in *Brownlie v. Campbell*, 5 App. Cas. 925 937. He says: "When the conveyance takes place it is not as far as I know, in either country," (*i. e.*, England or Scotland,) "the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of *misrepresentation amounting to fraud*, by which the purchaser may be deceived."

The question would be, whether there was such fraud or misrepresentation as to entitle the party to damages though the contract be not set aside, in other words, as I take it, whether there is sufficient to maintain what would, before the Judicature Act, have been called an action of deceit.

So it is put in the well-known case of *Thomas v. Crooks*, 11 U. C. R. 579, quoting at p. 588, *Butler's Note to Co. Litt.* 384, note 1: "Where the seller conceals from the purchaser the instrument or the fact which occasions the defect, it is a fraud, and the purchaser *has the remedy of an action on the case, in the nature of an action of deceit.*"

There was here the representation of a particular fact—what Lord Cairns, in *Peck v. Gurney*, L. R. 6 H. L. 377, at p. 403, calls an active misstatement of fact, relating to and indeed involving the very existence of part of the subject matter of the contract. The person making it, moreover, knew how the fact really was, and yet stated it otherwise than it was, not once only but a second time and then in writing. Had there been but the one occasion spoken of by Mr. Morton when the first schedule was prepared, I should not have felt justified in finding that there was a misstatement of

(*a*) And see *Jolliffe v. Baker*, 11 Q. B. D. 255.

fact, I would have leant rather to the view that Mr. Morton might have been mistaken in taking down what was said, though there is a detail about the particulars which involves a difficulty in making that assumption. It was intended that the party to whom the statement was made should act upon it. He did so, and now finds that it was untrue, and that he has sustained, damage thereby. Still there was, I am certain, no positive intention to deceive.

As I dispose of this part of the case on another ground, I do not feel called upon to go through the cases at length in order to determine whether there was here that combination of fraud and falsehood which are the ingredients of the action of deceit. There is a recent case before my brother Ferguson (*a*), in which it was held that the distinction between legal and moral fraud in this respect still exists, and here it may be urged that the statement was made by Fraser with such recklessness as to make him liable, just as if he knew it to be false.

The rule is expressed by Maule, J., in *Evans v. Edmonds*, 13 C. B. 777, at p. 786 : " I conceive, that, if a man, having no knowledge whatever on the subject, takes upon himself to represent a certain state of facts to exist, he does so at his peril, and, if it be done either with a view to secure some benefit to himself or to deceive a third person, he is in law guilty of a fraud, for, he takes upon himself to warrant his own belief in the truth of that which he so asserts. Although the person making the representation may have no knowledge of the falsehood, the representation may still have been made fraudulently."

I should be inclined, if necessary, to hold that the plaintiffs had proved enough to maintain their action, and I think the recent cases of *Brownlie v. Campbell*, 5 App. Cas. 925 ; *Mathias v. Yetts*, 46 L. J. 497, 502, C. A ; *Leddell v. McDougal*, 29 W. R. 403, C. A., not to be found in the Law Reports series ; *Hart v. Swaine*, 7 Ch. D. 42 ; *Red-*

(*a*) See *Petrie v. Guelph Lumber Co.*, 2 O. R. 218. This case now stands for judgment in the Court of Appeal. See also *Reese River Mining Co. v. Smith*, L. R. 4 H. L. 46, per Lord Cairns ; *Eaglesfield v. Marquis of Londonderry*, 4 Ch. 693, at p. 711 ; *Cargill v. Bower*, 10 Ch. D., 502, at p. 516 ; *Jolliffe v. Baker*, 11 Q. B. D. 255.

grave v. Hurd, 20 Ch. D. 1; *Smith v. Chadwick*, 20 Ch. D. 27; *Arkwright v. Newbold*, 17 Ch. D. 301, are also very much in their favour.

It was, however, strongly contended that the plaintiffs must be assumed to have had notice through their solicitor, in the course of the transaction, that the schedule had been altered, and that what they were acquiring was the two Fee mortgages which had been actually assigned to them.

As I have already observed, if they had such notice it puts an end to the claim now under consideration.

The following evidence was given on the subject by Mr. Caston. He said that he was solicitor for the plaintiffs, and received instructions from Mr. Morton to prepare an assignment of the mortgages shewn on the list, that is, the schedule prepared by Mr. Fraser.

Q. "At the time he handed it to you, were these changes in it?" A. "I don't remember when they appeared." Q. "You do not know whether you received instructions as these papers now are or not?" A. "Yes, I got instructions as they now are, because the figures I carried out evidently coincide with these figures." Q. "When Mr. Morton gave it to you it had pencil figures as these?" A. "Yes." Q. "And your instructions were to draw it according to them?" A. "Yes." Q. "And you drew it accordingly?" A. "I did so." Q. "Did you ask why the changes were made?" A. "No, I accepted that, because it appeared in Mr. Fraser's handwriting." Q. "You did not ask Mr. Morton anything about it though Mr. Morton gave it to you?" A. "No." Q. "Were you not directed to verify—to see that the mortgages you were assigning corresponded with these?" A. "The mortgages themselves, but not the amounts." Q. "You drew the document, I suppose, first in the rough, and handed it to Mr. Morton to read?" A. "I have no doubt I went over it with him."

Re-examination. Q. "In preparing the assignment who handed exhibit 2, (the second list) to you?" A. "In the first place I got it from Mr. Fraser, I think; then it passed from one to the other. It was in my hands

more than once." Q. "From whom did you receive it that time?" A. "From Mr. Fraser." Q. "It was then on receiving it last time you drew the assignment." Q. "When you received it last time it was in the pencil condition?" A. "Yes, because the alteration in pencil was in his figures, I did not hesitate to think it was all right." Q. "Do you mean to say that paper had the alterations in pencil when you received it from Mr. Morton?" A. "I do not particularly remember when I received it in the first place. I can't say distinctly when I got it from Mr. Morton. As near as I can remember, Fraser gave me the list, then Morton would have it; it came back to me then when I got the drafts; I got it from Fraser; then it is when I first commenced to draft the assignment." Q. "Did you see these pencil alterations until the last time when you went to draw that?" A. "No, I can't remember that I did." Q. "Can you say they were on it when you received it from Mr. Morton?" A. "No; I can't say that."

Mr. Fraser thinks that Fee must have decided shortly before the early part of January not to pay off his mortgages, as he made certain payments on account on the 10th January.

And as to the alterations in the schedule, he says: Q. "When you gave it to Mr. Caston to draft the altered assignment you altered it?" A. "Yes; it had to be in accordance with the facts; this could not go into the assignment because of course there was no mortgage for the amount. I made up the discount on the two mortgages and put them before Mr. Caston."

On cross-examination, he says that "the change was made shortly before the assignment was executed, perhaps within a week, or two or three weeks." Q. "How did you come to make the change?" A. "When Mr. Caston and I were going over the mortgages in the office comparing them to see if they were correct, we came to the Fee mortgage. I said to him these mortgages will have to stand over until to-morrow. I shall have to take them home with me to night and make calculations, and bring them

down in the morning. This alteration was done when Mr. Caston and I were going over the deeds, *i. e.* the assignment." Q. "He had drawn out the assignment, and you were checking it with the list." A. "We were checking it; he was going over to see if he had all the mortgages with him. These figures were left blank. When we came to the Fee mortgage I said it must be left blank until after I had made the calculations at home. I made the alterations there, and came down and told Mr. Caston to fill in the figures."

I think the evidence of Mr. Fraser and Mr. Caston leads to the following conclusions: first that when Mr. Caston received the second schedule or list from Mr. Morton, as it is probable he did in the first instance, there had been no alteration in it: that he then prepared the draft assignment and schedule either from it, as far as it afforded the necessary information, or from the mortgages themselves, as seems more probable, and then proceeded to check them over with Mr. Fraser. Up to this time there could have been no alteration in the schedule. That I think was not done till Mr. Fraser computed the discount for the purpose of making the necessary entries in the assignment. His evidence seems to be reasonably clear and precise on this point, whatever may be said of it in other particulars, and Mr. Caston's is very much the reverse. Mr. Caston must have known when he prepared the defendants' assignment or when Mr. Fraser made the computation I have spoken of, that there were in fact two Fee mortgages instead of the one mentioned in the schedule, and of a different character, and the alteration in the schedule must have been brought to his attention then.

I find, therefore, that the solicitor had notice of the error and alteration in the schedule before the execution of the conveyance or the completion of the transaction. Is that to be taken as notice to the plaintiffs? I think it must be.

The rule is thus stated by Fry, J., in the recent case of *Bradley v. Riches*, 9 Ch. D. 189, 195; "You must, in the first place, look at what are the circumstances of the case

as to knowledge. If the circumstances of the case are such as in the ordinary course of business between solicitor and client they are, then the solicitor must be assumed to have communicated the fact to his client, and the knowledge of the agent is, to use the language of Lord Chelmsford in *Lspin v. Pemberton*, 3 De. G. & J. 547, the imputed knowledge of the client. It appears to me to be clear that presumption or imputation is a thing which the client cannot be allowed to rebut. If it could be rebutted, it was amply rebutted in *Le Neve v. Le Neve*, 3 Atk. 646. If it could be rebutted, the language of Lord Hatherley in *Roland v. Hart*, L. R. 6 Ch. 678, 682, could not be upheld. His lordship says: 'The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor. It cannot be left to the possibility or impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain.'

In *Cave v. Cave*, 15 Ch. D. 637, the same learned Judge had occasion to refer to the exception to the rule which arises in the case where the conduct of the solicitor is such as to raise a conclusive presumption that he would not communicate the fact in controversy, as, *e.g.*, where he has intended a fraud which would require the suppression of his knowledge from the person on whom he has committed it. No exception of that kind of course arises here.

The solicitor was employed for the purpose of preparing an assignment of and taking over certain scheduled mortgages, and he acquired in carrying out that very transaction notice that a scheduled mortgage was not to be assigned—was not forthcoming—and that in lieu thereof two other mortgages were substituted.

There is nothing in these circumstances, or in any of those I have mentioned, to raise a presumption that the

solicitor would not communicate to his clients the notice he had thus acquired.

See also *Allen v. Southampton*, 43 L. T. N. S. 625; *Drifill v. Goodwin*, 23 Gr. 431.

As to the first count therefore the action fails. Should the Court hereafter come to a different conclusion I think the damages should be assessed at \$560, which from the only evidence I have before me would appear to be the difference in value between the mortgages as represented in the schedules and the mortgages actually assigned.

The third, fourth, and fifth counts are framed upon the covenant in the assignment that the mortgages assigned were good and valid charges upon the lands, and that the defendants had not done or permitted any act, &c., whereby the mortgages had become released or discharged in part or in entirety.

As to the liability of the defendants on a covenant in these or similar terms, see *Powell v. Baker*, 13 C. P. 194.

Three mortgages are referred to in the evidence on this part of the case, those namely of Gow, Duncan, and Symington, and the lands mentioned therein were set forth in the second part of the schedule or list of lands for which purchasers were being sought. The Gow mortgage was upon lots 23 and 24, in concession B, of the township of Watt. The price likely to be realized was stated in the schedule as being \$500, and Mr. Morton said that Mr. Fraser told him the property was worth that sum, and that that sum could be got for it. There was no other evidence of its value than the prices realized at the sale for taxes, in all a little more than \$80. It had in fact been sold in December, 1876. The sale appears to have been regular in all respects, and I think the plaintiffs are entitled to recover on the third count in respect of the Gow mortgage the sum of \$500.

As to the Duncan mortgage on lot 22, east side of Muskoka River, township of Muskoka, it was valued in the schedule at \$100. Fifteen acres had been regularly sold for taxes in December, 1874, and the loss likely to be sustained

in consequence was stated to be \$30, or \$40. I think I may fairly assess the damages at \$35. The third mortgage was from one John Symington on lot No. 18, east side of the Muskoka Road, in the township of Morrison. Forty acres of this lot had been regularly sold for taxes in December, 1876. The loss on this is stated to be \$100. I have no evidence to the contrary. I therefore allow that sum.

Dr. McMichael urged that the covenant sued was *ultra vires* of the defendants or their directors. No authority was cited for the contention.

As I understand the rule, a company, unless there is something to the contrary in their charter or Act of incorporation expressly or by necessary implication restraining them, are in the same position as regards their right and power to deal with their property as an individual. They may mortgage or sell or assign it if they please, and if so it would seem to follow that they may enter into any reasonable covenants which are usually found in the particular instrument which may be in question. I refer to R. S. O. ch. 98, sec. 8; *Re Patent File Co.*, L. R. 6 Ch. 83; *Brice on Ultra Vires*, 2nd ed. p. 214.

Under the sixth count the plaintiffs claim to be recouped, for, among other payments, moneys paid by them for arrears of taxes on mortgaged lands, I stated at the trial that these moneys were not in my opinion recoverable. I think so still.

There is no covenant against incumbrances, nor can it be said in any sense that the taxes were paid at the request of the defendants. They were not taxes for which the defendants were liable, they were due by the mortgagors only.]

The plaintiffs also claim under this count, the sum of \$600 paid to the defendants' solicitors for costs due to those gentlemen by the defendants.

It appears that the defendants or Mr. Fraser, their manager, continued to receive moneys at the defendants' office for the plaintiffs, after the contract and pending its completion, and subsequently up to the 31st March. In

by the tacit consent of and for the convenience of the plaintiffs, and perhaps of both parties, no apparent change was made in the business, although every thing belonged to the plaintiffs after the 1st December. An account of receipts and disbursements between that time and the 31st March was rendered by the defendants, in which they credit themselves with the \$600, as having been paid in full of their solicitor's account. This was not a debt which the plaintiffs had assumed. It was paid by cheque of Mr. Fraser. *Primâ facie* therefore, and assuming, as I think it would have to be assumed, that these moneys were received by the defendants, they must account for them. But it is quite clear from the evidence of Mr. Morton and Mr. Fraser that the payment of the \$600 in question was authorized by the former on behalf of the plaintiffs. He says he did so because he had been told that the solicitors claimed a lien on the papers, and that they could not be obtained without payment of their account. There is, however, no evidence that any lien was in fact claimed. Mr. Caston does not refer to the subject in his evidence at all, and Mr. Fraser says that he never heard of any lien or claim for one: that the solicitors spoke to him about their costs amounting to some \$840 or \$850, and offered to accept \$600 in full: that he told this to Mr. Morton and Mr. Caston, and proposed that the plaintiffs should take a safe valued at \$200 and the office furniture of the defendants, and give them a cheque for \$600 to pay these costs, urging that the plaintiffs would probably realize enough out of unsettled suits to pay the difference, and ultimately he got authority to pay the \$600, and did so. On this evidence I cannot treat the \$600 as otherwise than a voluntary payment made under the circumstances mentioned by Mr. Fraser. His statement is not contradicted by Mr. Morton, and there is no evidence of the existence of a lien or claim of one in fact. The action, therefore, fails as to this claim also.

As to the costs, the plaintiffs have succeeded for a

substantial part of their demand, but have failed as to the rest. I think they should have one half of the general costs of the cause, and in addition the costs incurred in respect of the witnesses who gave evidence as to the tax sales.

During Easter Sittings, *Ogden* moved on notice to set aside the judgment for the plaintiffs, and to enter a judgment for the defendants, or to reduce the damages.

A. C. Galt, on behalf of the plaintiffs, moved to increase the damages.

During the same Sittings, June 6, 1883, *J. K. Kerr*, Q. C., and *A. C. Galt*, supported the plaintiffs' motion, and shewed cause to the defendants.

Robinson, Q. C., contra.

The arguments sufficiently appear in the judgments.

The following cases were referred to: *Dart* on V. & P., 5th ed., 348; *Dobell v. Stevens*, 3 B. & C. 623; *Follis v. Porter*, 11 Gr. 444; *Coates v. Bacon*, 21 Gr. 21, 25; *Rolland v. Hart*, L. R. 6 Ch. 678; *Agra Bank v. Barry*, L. R. 7 H. L. 135; *Hunter v. Waters*, L. R. 7 Ch. 75; *Kettlewell v. Watson*, 21 Ch. D. 685, 704; *Wardell v. Tremouth*, 24 Gr. 465; *Arkwright v. Newbold*, 17 Ch. D. 301, 307.

June 29, 1883. WILSON, C. J.—The plaintiffs make a claim upon the defendants for the following items:

On Fee's mortgage	\$780 00
Cash deducted by defendants to pay their	
solicitor's account	600 00
Damages for lands sold for taxes	635 00
	<hr/>
	\$2015 00

The learned Judge allowed the last sum, composed of three different items, to the plaintiffs. The defendants had in their sale to the plaintiffs assumed to sell lands which had been before that sold for taxes. We do not see how that sum can be disputed.

The other items were not allowed. As to the \$600, Mr. Fraser stated it was expressly agreed upon between Mr. Morton and Mr. Caston acting for the plaintiffs, and himself acting for the defendants, that if the plaintiffs would pay the claim of the defend' 's' solicitors, reduced by the solicitors to \$600, the defendants would give to the plaintiffs a safe for \$200, and their office furniture, and upon that agreement the payment was assented to by Mr. Morton and Mr. Caston, and the money was paid to the solicitors. Mr. Morton denies that any such arrangement was made. The learned Judge having decided it in favour of the defendants, we leave it as he disposed of it. We think Mr. Fraser's evidence more circumstantial and more satisfactory than that which was opposed to it, and that is the impression which it produced on the mind of the learned Judge.

The remaining item relating to Fee's mortgage is the only part of the claim which is to be considered. The plaintiffs claim the difference between the amount that mortgage was stated to be, \$4,700, at 8 per cent., and the sum of \$3920, the value of Fee's debt as an 8 per cent. paying security. Fee did not in fact owe to the defendants a mortgage for \$4,700 bearing 8 per cent. He owed to the defendants two mortgages, payable on the instalment principle at 6 per cent., one for \$5540.53, the other for \$485.75.

Mr. Fraser explained how these two mortgages amounting to \$6,026.28, came to be reduced to \$4,700. He said, "Mr. Fee wanted to pay off the two mortgages. He was getting a loan from another company. His account I made up was \$4,700, which he consented to pay. He said that shortly before the schedule was made out, and the sum of \$4,700 was put into the schedule. * * There was no intention to give another mortgage. The intention was to pay the \$4,700 off * * * We were willing to take that instead of these two mortgages, and I supposed it would be carried out; but he ultimately determine' not to carry it out." However it may be, the value of Fee's

liability was stated at \$4,700, and as Fee did not carry out his proposition to pay off that sum it was afterwards reduced by the discount made upon it to \$3,920; but the addition was made as if the \$4,700 had not been reduced to \$3,920, and so \$780 more is contained in the aggregate account of the mortgages than should have been; and that is the sum now claimed.

The plaintiffs' statement is, that they were buying the defendants' securities on a basis of 8 per cent. paying investment, and as their security was added up at \$780 too much, it has to be repaid.

The defendants' account of it is this—that upon the schedules made out by the defendants and given to the plaintiffs there was a discussion between the parties negotiating the transaction, respecting the valuation or payment of a round sum in full of everything.

Mr. Morton said his valuation was \$56,732, and \$4,792 less than the valuation of the defendants, and the plaintiffs paid \$40,000 in shares of the said company, and assumed the depositors' claims against the defendants amounting to \$16,682.82. He would not take the defendants' valuations, because he did not think they were correct.

If each security was valued by itself, and was delivered by the defendants and was received by the plaintiffs as its value, the defendants may be liable to the plaintiffs for the deficiency in any security arising from error or mistake, even although the full aggregate value was not paid by them. But if the separate value of each security was made as a basis upon which to make an estimate in full for the aggregate amount, and such estimate was made, and a proposal in gross was made at a reduced sum and was accepted, and such reduction was made to cover mistakes, over valuation, and the like, which might be expected to occur in so large a transaction consisting of so many figures and troublesome computations, and all was done in good faith, it would be an exceedingly difficult matter to reopen the account, unless the sum were so great that it would be a species of imposition, or almost in the nature of a fraud, not to give relief.

Parties may, if they please, bargain for a thing just as it is, and if they get what is bargained for, and everything be fair, they must be content to abide by their own voluntary contract. They may buy with all faults, if they choose.

Mr. Morton said: "The defendants sold for \$40,000 which was represented by certain property. The mortgages were calculated on a valuation of 8 per cent., as before stated, and \$40,000 was paid for them in lump. The change was made as to the Fee mortgage before the assignment was executed. I took the Fee mortgage as it was stated to be, a straight mortgage for \$4,700." Mr. Fraser said the difference between the two valuations of \$4,722.96 was to stand against any contingencies that might happen in realizing any loss that might occur; they wanted a contingent fund to stand against any deficiency in value that might occur. Mr. Morton said he did not know the Fee mortgage was not just as it had been represented at \$4,700. Mr. Fraser says he did know it, as he explained it to Mr. Morton.

The opinion I form of that matter is this, that Mr. Fraser did represent it to Mr. Morton, for Mr. Morton could have got his information in no other way, and he wrote down just what Mr. Fraser told him, that Fee's mortgage was for \$4,700 for five years at 8 per cent., payable half-yearly. Mr. Fraser may have told Morton at that time that there was no such mortgage, but that Fee wanted to have his liability placed upon that footing. If he did, he was not explaining correctly what Fee wanted, which was to know how much he would have to pay to discharge his mortgage altogether. How then did the five years, and the 8 per cent. half-yearly, find their way into the schedule? It must have been more Mr. Fraser's doing, I think, than Mr. Morton's.

It is not impossible when the next schedule was made out just as the preceding one, that Mr. Fraser knew then Mr. Fee would not make any change in his liabilities, and the entry was then made and altered as follows,

the alteration being in the writing of Mr. Fraser:—John Fee, instalments \$35.29.

NAME.	PAYMENTS TO MATURE.	DUE.	TOMATURE.	TOTAL.	DISCOUNT.	NET VALUE
John Fee	2 mortgages: 157 instal of \$35.79 each;	\$70 58	\$5540 53	\$5611 11	\$169 00	\$3920 11
	23 instal. of \$21.25 each.		4700 00	4700 00		4700 00
	1700 8 % $\frac{1}{2}$ yearly	302 56	488 75	780 00	101 33	698 92

The total was added up with the figures at \$4,700, in place of at the corrected sum of \$3,920, being \$46,804.96, in place of \$780 less than that sum.

For the defendants it was argued that if the \$780 had been deducted from the expressed aggregate it would not have made the slightest difference in the result agreed upon between the parties in stating the purchase money at the round sum of \$40,000; and besides that, there being no fraud, or misrepresentation, or concealment, but everything being fair, and there being no intent to deceive, and a lump sum having been offered and accepted, there can be no remedy for the deficiency on the Fee mortgage, even although the explanation respecting it said to have been given by the defendants had not been given.

I do not think the evidence shews deceit, which is in effect fraud, nor a false representation, nor a misrepresentation, not certainly, according to Mr. Fraser's evidence, as he says he explained everything to Mr. Morton about Fee's mortgage, nor perhaps according to the general tenor of the evidence, if the securities were bought, as I rather think they were, for a round sum, although no doubt upon the basis of the correctness of the schedule made out by the defendants and delivered to the plaintiffs, because an allowance was made from the estimated value put upon the securities of about \$6,000, as I make out, to cover the deficiencies in value, and I should say also errors and mistakes, to a certain reasonable amount at any rate, and I cannot say that a difference of \$780 upon so large a transaction is so great a sum that if certainly known at the time and discussed between the parties it would have reduced either the sum which the defendants agreed to take, or the sum which the plaintiffs proposed to pay.

It is not then a case for compensation, nor a ground of an action for deceit. We think then the ruling of the learned Judge was right in all respects, and that both notices of motion must be discharged, without costs.

GALT and OSLER, JJ., concurred.

Motions dismissed.

[CHANCERY DIVISION.]

MARTIN V. McALPINE ET AL.

Fraudulent preference—Pressure—Cognovit actionem—R. S. O. ch. 118.

Where an execution creditor filed his bill claiming priority over a certain judgment and execution obtained upon a *cognovit actionem* given by one F. to M., another execution creditor, on the ground that the same was fraudulent and void under R. S. O. ch. 118, and it appeared that the *cognovit* was not voluntarily given, but was the result of clear pressure on the part of M.

Held, that the transaction was protected, and the judgment and execution of M. could not be impeached.

Brayley v. Ellis, 1 O. R. 19, followed.

CALEB ELLSWORTH MARTIN, the plaintiff in this case, filed his bill against Alexander McAlpine and Andrew Farrell, seeking to have it declared that a certain *cognovit actionem* given by the defendant Farrell to the defendant McAlpine was fraudulent and void as against him. and invalid and ineffectual to support a judgment and execution of the said McAlpine obtained thereon; and that it might be declared that a certain judgment and execution of him, the plaintiff, were entitled to priority over the judgment and execution of McAlpine, and that McAlpine might be ordered to pay the proceeds of a certain sheriff's sale of Farrell's goods and chattels, which had taken place under the said execution and certain other executions, and

which the sheriff had paid over to McAlpine, to him the plaintiff.

From the plaintiff's bill it appeared that he commenced the action in which he ultimately obtained judgment against Farrell, before McAlpine commenced the action, in which judgment was obtained by him on the *cognovit* in question; and that by means of the said *cognovit* McAlpine had been able to place writs of execution in the sheriff's hands before the plaintiff, and so to gain priority; and the plaintiff charged that Farrell, being at the time in insolvent circumstances and unable to pay his debts in full, by collusion with McAlpine gave the said *cognovit actionem*, with intent in giving the same to defeat and delay the plaintiff and his other creditors in recovering their just debts, or with intent thereby to give McAlpine a preference over the plaintiff and his other creditors, and McAlpine took the same to further the same objects; and that at the time Farrell gave to McAlpine the said *cognovit actionem*, McAlpine promised and agreed to and with Farrell not to enforce the judgment to be recovered thereby, but to give him time to pay, and to protect his goods and chattels from the plaintiff and his other creditors.

The defendant McAlpine by his answer denied the material allegations on which the plaintiff rested his complaint.

The defendant Farrell did not answer and the bill was noted *pro confesso* as against him.

The case was tried at Lindsay, on April 18th, 1882, before Proudfoot, J.

Amongst other evidence given at the trial was that of the defendant McAlpine, who, with reference to the circumstances under which he obtained the *cognovit actionem* said as follows:—

“I told him, (Farrell), I would have to sue him if he did not give me security, I should have to sue him and he had better give me security, * * I told him to give me judgment, and I wouldn't press the matter.”

C. Moss, Q.C., and *G. H. Hopkins*, for the plaintiff. The *cognovit actionem* was fraudulent and void within R. S. O. c. 118, s. 1. The doctrine of pressure does not apply.

S. H. Blake, Q.C. The transaction impeached was not voluntary. There was pressure. It is sufficient if there has been merely a request. The debtor here did not come "voluntarily" to give the security, within the meaning of R. S. O. c. 118, s. 1.

The following cases were cited on the argument: *White v. Lord*, 13 C. P. 289; *Bank of Montreal v. McTavish*, 13 Gr. 395; *Bevan v. Wheat*, 14 C. P. 51; *Labatt v. Bixel*, 28 Gr. 593; *McKenna v. Smith*, 10 Gr. 40; *Young v. Christie*, 7 Gr. 312. *Wade v. Kelly*, 2 C. L. T. 197; *Totten v. Douglas*, 15 Gr. 126; *Whitney v. Toby*, 19 C. L. J. 347; *Turner v. Patterson*, 13 C. P. 412; *Currie v. Gillespie*, 21 Gr. 267; *Mills v. Kerr*, 32 C. P. 68.

June 6, 1882. PROUDFOOT, J.—The bill in this case was by one execution creditor, impeaching a judgment obtained upon a *cognovit* given by the defendant Farrell to the defendant McAlpine, another execution creditor, as offending against the Act respecting the fraudulent preference of creditors: R. S. O. ch. 118. Several important questions were discussed as to the right of an execution creditor to impeach such a transaction in the absence of fraud, as to the solvency or otherwise of the debtor, as to the application of the Act to this transaction under its peculiar circumstances, and as to the effect of the conduct of the plaintiff, and whether after a sale and payment over of the proceeds by the sheriff the potential equity to interfere with the transaction had not evaporated. If the nature of the suit had been such as to enable me to give any relief to the debtor Farrell, it would have been a satisfaction to me to do so, if it could in conformity with legal principles have been done. For I think he has been the victim of exorbitant interest charged on loans; and, as he pathetically expressed it in his evidence, "The interest was so high that

it ruined me, and has left me without a home to-day." And the defendant admitted that he charged Farrell 40 per cent. for loans. The interest charged by the plaintiff, though high, "was nothing near McAlpine's." But this suit is only a struggle between creditors for the relics of this man's property, the ruins of a once flourishing home.

But I am relieved from considering the various questions I have mentioned, because on one point it seems to me that the judgment must be for the defendant; and that is, that the cognovit was not voluntarily given, but was the result of clear pressure on the part of the defendant. The defendant told Farrell, if he did not give him security he would sue him, and in consequence of this demand the cognovit was given.

In *Brayley v. Ellis*, 1 O. R. 119, my brother Ferguson has had under consideration the effect of pressure as protecting a transaction of this kind under the R. S. O. ch. 118; and, after referring to *Davidson v. Ross*, in App., 24 Gr. 22, he decided that "so-called doctrine of pressure now occupies the same position as it did before the passing of the section (of the insolvent law) on which the case, or the branch of the case—*Davidson v. Ross*—alluded to, was decided." The cases on the effect of pressure as unaffected by our insolvent law are quoted by Patterson, J.A., in that case, 24 Gr. p. 64.

Upon the evidence I think it satisfactorily established that there was a debt due from Farrell to McAlpine to the amount of the judgment, made up no doubt to that sum by means of the excessive interest charged. But that was according to their agreement, with which on the materials before me I cannot interfere.

I shall therefore follow the decision of my brother Ferguson, and judgment must be for the defendant, with costs. (a)

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[CHANCERY DIVISION.]

THE CORPORATION OF THE TOWNSHIP OF PEMBROKE V.
THE CANADA CENTRAL RAILWAY COMPANY.

Railways—Railway on highway—Leave of municipality—Acquiescence by corporation—Exercise of municipal powers without by-law—31 Vic. ch. 68, D. sec. 10.—R. S. O. 174, sec. 277.

Where a railway company constructed their railway along a highway in a municipality, the council whereof were not formally applied to for leave, but subsequently passed a resolution notifying the railway company to fill up the ditch existing on both sides of the railway, and to put down proper crossings :

Held, that the corporation had thereby admitted that the railway company were lawfully in occupation of the highway, and could not afterwards object.

The leave of the municipal or local authorities required by 31 Vic. ch. 68, D., before a railway is carried along an existing highway, may be granted at any time whether before, during, or after the construction of the railway, and need not necessarily be given by by-law.

Semble, that R. S. O. ch. 174, sec. 277, enacting that the powers of township councils shall be exercised by by-law—must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another Legislature.

Held, also, that the corporation having stood by while the railway was constructed, and subsequently for upwards of five years, while it was in operation, and having also by the resolution aforesaid, procured further expenditure by the company, were bound by acquiescence, and could not now maintain an action for the removal of the railway from the street. A corporation may be bound by acquiescence as an individual may.

Quere, whether such acquiescence would have availed as a legal justification for the defendants on an indictment for a nuisance at the suit of the Crown.

THIS was a bill filed by the corporation of the township of Pembroke, against the Canada Central Railway Company, stating that the defendants in constructing their railway had, without the leave of the plaintiffs, and contrary to the provisions of "The Railway Act, 1868," (a) carried it along the entire length of a public highway called Main street, in the unincorporated village of Campbelltown in the said township : that the defendants' trains passed and repassed daily over the line so constructed by them : that the plaintiffs as well as the travelling public, were inconvenienced thereby; and that the running of the railway along the highway was a public nuisance.

They submitted that a writ of mandamus ought to be issued commanding the defendants to remove the railway from the street, and prayed that the defendants might be restrained by injunction from permitting the street to remain any longer obstructed by the railway.

The defendants by their answer alleged that the railway had been located and constructed along the street about five years before the commencement of the suit, and had since then been constantly operated upon, and along it for all the purposes of the railway, and was part of the main or trunk line of the railway : that it had been so located or constructed with the consent and acquiescence, though not expressed in writing, of the proper municipal authorities, and of all the inhabitants and property owners of the village; and that the first intimation the defendants had that their proceedings were objected to, was by a letter received from the plaintiff's attorney on the 31st of May, 1880, four years after the railway had been in operation.

The cause was tried at the Spring Assizes at the town of Pembroke, on March 22nd and 24th, 1882, before Osler, J.

C. Moss, Q. C., and W. R. White, for the plaintiffs. Under 31 Vict. ch. 68, secs. 10, D., a railway shall not be carried along the line of an existing highway, except by leave, and this leave can only be given by by-law: R. S. O. 174, s. 561. No knowledge or action of individual members of the council can affect the question, nor can the corporation be affected by anything done after the railway took possession. They were not at all estopped by requiring crossings to be made, or by requiring the company to fill up the deep ditches: *Norton v. London and North Western R. W. Co.*, L. R. 9 Chy. D. 623. As to any question of delay, that only affects the right to an interim injunction, not to a final one.

J. H. Metcalf, for the defendants. These proceedings are instigated by certain private individuals. The consent of the municipality may be given without by-law. Then again there has been delay and acquiescence on the

part of the plaintiffs. The Act of 1868, 31 Vic. ch. 68, D., is the one which applies here. The council are not governed by the Municipal Act. I refer to *In re Day and the Town Council of Guelph*, 15 U. C. R. 126; *Regina v. The Grand Trunk R. W. Co. of Canada*, 15 U. C. R. 121; *Regina v. The Great Western R. W. Co.*, 21 U. C. R. 555; *The Corporation of the County of Welland v. The Buffalo, &c. R. W. Co.*, 30 U. C. R. 147; *S. C. in Appeal*, 31 U. C. R. 531; *In re Devlin and the Hamilton, &c. R. W. Co.*, 40 U. C. R. 160; *The Directors, &c. of the Hammersmith and City R. W. Co. v. Brand*, L. R. 4 H. L. 171; *Ward v. The Great Western R. W. Co.*, 13 U. C. R. 315; *Hamilton v. Covert et al.*, 16 C. P. 205; *Baird v. Wilson*, 22 C. P. 491; *In re Colquhoun and the Town of Berlin*, 44 U. C. R. 631; *Howe v. The Hamilton and North Western R. W. Co.*, 3 App. 236; *Macpherson v. The Queen*, 18 C. L. J. 93; *Fenelon Falls v. Victoria R. W. Co.*, 29 Gr. 4; R. S. O. ch. 174, s. 506, and notes to that section in *Harrison's Municipal Manual*, p. 507, *et seq.*

September 5, 1882. OSLER, J.—The 10th section of the Railway Act, 1868, 31 Vic. ch. 68, D., and the Consolidated Railway Act, 1879, 42 Vic. ch. 9, D., the Acts to which these defendants are subject, enacts that the railway shall not be carried along an existing highway; but shall merely cross the same in the line of the railway, unless leave has been obtained from the proper municipality or local authority therefor.

On the evidence, I find that the defendants carried their railway along a highway called Main street, in the unincorporated village of Campbelltown, in the township of Pembroke, and that no formal application was ever made by them to the township for leave to do so. I also find as a fact that the individual members of the council and the property owners in the village knew that the railway company were laying down their rails upon and intended to use the street in the manner now complained of, from the very first, and that it was assumed by every one that there

would be no objection, and none was in fact made to their doing so. The grading along the street was completed before the fall of the year 1875, and the railway was in operation in the fall of 1876, (in which year the track along Main street was fenced in,) and has continued running ever since. On September 30th, 1876, a special meeting of the township council was held, from the minutes of which it appears that complaints had been laid before the council of the manner in which this street had been "canalled;" and the following resolution was thereupon passed by the council: "That the railway company be notified to fill up the deep ditches on both sides of the track on the street, and have proper crossings put down at each cross street in the village of Campbelltown, and that the clerk be required to furnish the company with a copy of this resolution."

The resolution was accordingly communicated to the company, who complied with it, and continued to work their line without further complaint or objection until May 31st, 1880, when they were required by a letter from the plaintiffs' solicitors to immediately remove their railway from the whole length of Main street, the reason assigned being that they had never applied for or obtained leave from the plaintiffs to lay it there.

It does not appear, as it should do, on the certified copy of the pleadings, when the bill was filed. The answer appears to have been sworn on August 15th, 1881, and it is stated that with the exception of the letter I have referred to and another written a few days before the filing of the bill, no complaint was ever made of the obstruction of the street by the railway.

I think it is an inference proper to be drawn from the evidence that the suit, though brought by the plaintiffs in good faith, has been so brought at the instance of the inhabitants and property owners of the village.

I also find, as a fact, that although it is still quite possible to use the street as a highway, and it is in its present state ordinarily sufficient for the trifling amount of

travel thereon, yet that the free and convenient use of it is, and necessarily must be, greatly obstructed by the existence of the railway.

I think it was not disputed that the plaintiffs, in whom the highways of the municipality are vested, have such an interest in their maintenance and protection as would ordinarily entitle them to maintain an action like the present, even though the obstruction complained of amounted to an indictable nuisance. It was argued, (1) that the evidence shewed that the plaintiffs had never given the defendants leave to carry their railway along the streets, and (2) that if they had done so without authority there could be no answer to the suit on the ground of any implied acquiescence or of delay on the plaintiffs' part.

I am against the plaintiffs on both grounds. As to the first, all that the Railway Act requires is, that "leave shall be obtained from the proper municipal or local authority." Clearly such leave may be granted at any time, whether before, during, or after the construction of the railway. It is not said how it is to be granted, and the plaintiffs argue that it can only be by by-law. No doubt that would be the most proper way. Section 561 of the Municipal Act (*a*) was relied on, which enacts that the council of every township municipality may pass by-laws for authorizing any railway company, in case such authority is necessary, to make a branch railway on property of the corporation, or on highways, under such restrictions as the council sees fit, &c. This section applies in terms only to branch railways.

Section 277, which enacts that the power of the council shall be exercised by by-law when not otherwise expressed, seems more to the point.

Mr. Metcalf referred me to the case of *Regina v. Grand Trunk R. Co. of Canada*, 15 U. C. R. 121. The defendants there were indicted for a nuisance in obstructing a street in the town of Guelph, by occupying it with their road. The corporation had passed a by-law allowing them to do so, and

(a) R. S. O. ch. 174.

ordering a part of the street to be closed altogether as a highway. It was held that the by-law was not within that section of the existing Municipal Act, which required notice to be given in the prescribed way before passing a by-law to close a street, because such section applied only to by-laws passed in execution of the authority given by that Act for closing or altering roads. &c.

The Chief Justice said, at p. 124: "What has been done in this case was done under authority given by a statute passed some years afterwards for a special purpose (the Railway Act) which does not require the consent of the municipality to be given by a by-law, but merely provides that the railway company shall not carry their railway along a highway, without the leave of the municipality. We think that leave could be given by a resolution as well as by a by-law, and that whether it is given in one way or the other, all that is necessary is *the leave of the municipality*.

The same opinion was expressed in *In re Day and the Town Council of Guelph*, 15 U. C. R. 126, on a motion afterwards made to quash the by-law.

The municipal Acts in force when these cases were decided contained no provision similar to that of sec. 277 of the present Act, which seems to have been introduced for the first time in the Municipal Act of 1858, 22 Vic. ch. 99, sec. 186. They can hardly therefore be looked upon as decisive of the point in the defendants' favour. On the whole, nevertheless, I at present think that section 277 must be construed as referring to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another Legislature. The council may, and constantly do, express their intentions by resolution, and it is one of the forms of corporate expression recognized in the Municipal Act.

If the leave of the corporation may be given by resolution, as I think it may, I am of opinion that it has been sufficiently so given in the present case by the resolution

of September 30th, 1876, which is in effect an admission that the defendants are lawfully in occupation of the street, coupled with a request to put it into better condition.

The case of *Regina v. The Great Western R. W. Co.*, 21 U. C. R. 555, is a clear authority if one be wanted on this point. There the defendants were indicted for a nuisance in obstructing a street in the town of Sarnia. The Act 22 Vic. ch. 116, had enacted that all highways occupied by them with the *written assent* of the municipality, should be vested in them to the extent of the user permitted or enforced by the municipality. The question was, if such an assent had been given, and it was held that it might be inferred from a letter written by the authority of the council a few months after the railway had been opened and was in use, demanding compensation for the damages suffered by the town, but not complaining of the act of the company in having taken possession of the street as illegal.

I think, therefore, that it sufficiently appears that the defendants have complied with the provisions of the Railway Acts in this respect, but I do not dispose of the case on that ground, as it may become necessary, should proceedings be taken against the defendants in another form, to consider more fully the effect of section 277 of the Municipal Act, which was not argued.

The plaintiffs' case entirely fails, in my opinion, on another ground, that namely, of their acquiescence in the acts complained of. A corporation may be bound by acquiescence as an individual may : *Rochdale Canal Co. v. King*, 2 Sim. N. S. 78 ; *Brewster v. The Canada Co.*, 4 Gr. 443. And I see no ground for holding that a municipal corporation is exempted from the rule, although it may be impossible always to enforce it against them so strictly or to the same extent as in the case of other corporations or individuals. But the present case seems to me a plain one, I deal merely with the *locus standi* of these plaintiffs in

this Court, without expressing further than I have already done an opinion as to the existence of a legal justification for the defendants if they were called on to answer an indictment for a nuisance at the suit of the Crown. The plaintiffs occupy a different position and represent the public, if they do so at all, to a very limited extent. They had power to grant or refuse leave to do what they now complain of, a fact upon which I lay great stress. They knew that the defendants were about to lay down their railway on this street, or at all events knew that it was being done, and done with the belief that it was assented to by them, or that a formal assent could be procured if necessary, for the asking. They allowed the defendants to incur a large expenditure to build and furnish their railway, and to operate it daily for four or five years without objection. They recognized by their resolution what had been done, and procured the defendants to expend further moneys in grading the streets and making suitable crossings; and after all this, which is more than mere acquiescence,—whether of their own motion or prompted by others who now desire to make a profit out of the company it matters not—they seek the aid of the Court to compel the defendants to undo all that has been done, and to enjoin them from the continued user of the street.

“This Court,” says Lord Eldon, in *Dunn v. Spurrier*, 7 Ves. 235, “will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title, and the circumstance of looking on is, in many cases, as strong as using words of encouragement.”

These plaintiffs, in my opinion, stand in that position and to use the language of the Chancellor, in *Brewster v. Canada Company*, *supra*, to permit them under the circumstances I have mentioned to maintain this action, would be contrary to the plainest principles of reason and justice.

I refer also as supporting this conclusion to the cases cited in *Brewster v. The Canada Company*, *supra*, and to

The Municipality of the Township of Fredericksburg v. The Grand Trunk R. W. Co. of Canada, 6 Gr. 555; *The Corporation of the City of Kingston v The Grand Trunk R. W. Co. of Canada*, 8 Gr. 535; *Slater v. The Canada Central R. w. Co.* 25 Gr. 363; *Re Day and the Town Council of Guelph*, 15 U. C. R., at p. 131; *McKinnon and the Corporation of the Village of Caledonia*, 33 U. C. R. 502; *Redfield on The Law of Railways*, 4th ed., vol. 1, pp. 221, 297.

The bill is therefore dismissed, with costs.

[CHANCERY DIVISION.]

ATTORNEY-GENERAL V. THE MIDLAND RAILWAY COMPANY.

Pleading—Demurrer—General allegation of fulfilment of statutory requirements—Defence of possession in action for recovery of land—Statute of Limitations—Crown as trustee—Partial demurrer—Uncertainty or ambiguity in pleading—Practice—R. S. O. c. 165—Rules 144, 189.

In an action by the Attorney-General, upon the relation of the Bursar of Toronto University, to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the University, the defendants pleaded that the said lands had been, with the assent of the University and bursar, taken possession of by them for the purposes of their railway under their statutory powers, and that they had since retained and then were in possession thereof, and they also pleaded the Statute of Limitations.

Held, on demurrer, that it was necessary to set out specifically the statutes alluded to, in the various proceedings connected with the expropriation of the land, and the defence was not objectionable, upon demurrer, on the ground of want of certainty, by reason of its merely general allegation of compliance with the statutory requirements.

Held, also, that the mere allegation that the defendants were in possession afforded a good defence in law in such an action, and put the plaintiff to the proof of his cause of action, under Rule 144.

Held, also, that even if under R. S. O. ch. 165, the assent of the Lieutenant-Governor in Council to the expropriation of the lands of the lands by the railway was necessary, which it was not, yet after a user of the land by the railway for ten years, coupled with legislative recognition of the status of the railway company, and with the fact that the taking of it was with the assent of the University, and colleges, and

bursar, the formal assent of the Crown must be held to have been dispensed with, and trespass or ejectment would not lie.

Held, also, that the Statute of Limitations was no bar to the action, although brought by the Crown in its capacity as trustee of the land in question.

Regina v. Williams, 19 U. C. R. 397, followed.

In the case of a partial demurrer to a pleading under Rule 189, if any one or more paragraphs be demurred to, the Court will look at any other paragraph or paragraphs bearing on the same matter of defence, and if the whole taken together disclose a sufficient defence, the demurrer must be overruled.

When a pleading is ambiguous or uncertain, the proper remedy is to apply in Chambers to strike out or amend the defective matter, and a demurrer on that ground will not lie.

Held, in this case, that the demurrer being partly successful, and partly unsuccessful, neither party should get costs.

THE plaintiff in this action was the Attorney-General of Ontario, who prosecuted for Her Majesty on the information of J. E. Berkeley Smith, bursar of the University and Colleges at Toronto, and the defendants were the Midland Railway of Canada.

The statement of claim set out that the Grand Junction Railway Company had, at a time unknown to the plaintiff, wrongfully and without the knowledge or permission of plaintiff, entered into possession of certain lands of which Her Majesty was seized in fee simple, for the purposes of the University of Toronto, University College, and Upper Canada College, and committed trespasses thereon, and refused to give up possession of the same: that under an Act of the Parliament of Ontario, 45 Vict. ch. 67, the said Grand Junction Railway became consolidated with certain other railway companies, and formed one company under the name of the Midland Railway of Canada, the defendants: that the trespasses complained of, begun by the Grand Junction Railway Company, were continued by the Midland Railway, and that the said lands were taken possession of without the requirements of the several statutes relating to the Grand Junction Railway Company being complied with, and, amongst other things, without the consent of the Lieutenant-Governor in Council having been first obtained; and the plaintiff claimed possession of the said lands and costs of suit, damages for *mesne* profits, damages for the wrong complained of, an order

restraining the defendants from any repetition of the acts complained of, and general relief.

In the statement of defence occurred the following paragraphs :

3. That the said lands were taken by the said company with the said assent (*i. e.*, the assent of the said University and colleges at Toronto, and the said Smith, bursar) for the purpose of constructing, and on it is constructed a portion of the railway of the said company (*i. e.* the Grand Junction Railway Company) and now forms part of the railway of the defendants.

4 That the said the Grand Junction Railway Company, before the consolidation mentioned in the statement of claim with the said other companies, did act and were acting under the powers given them by the several statutes relating to said company. That having first complied with the requirements of the statutes for the purposes of the construction of their railway and works, they entered upon and took possession of the said lands, and that the lands so taken were within the quantity which by such statutes they had the right to take and use, and that they at the time of the said consolidation with other railways were in possession of the said lands, and have continued so to be for the space of six months and upwards before said consolidation, and the defendants have since said consolidation continued in the said possession, and that the causes of action in the said statement of claim mentioned accrued more than six months before the commencement of this suit.

5. That Her Majesty is simply trustee for the said University and colleges, which are or some of them are incorporated, and are a corporation or corporations under the statutes in that behalf, and the defendants submit that as such trustee, under the Railway Act of Ontario, and under the statutes relating to the said the Grand Junction Railway Company and to the defendants since the said consolidation, Her said Majesty is bound by the provisions of the said statutes, and the plaintiff's proper course and

remedy was to proceed to compel the defendants to fix the compensation to be paid for the said lands so taken and the damages sustained by such taking by arbitration, in the manner and by the proceedings and means in such case by said statutes provided, and the defendants claim in this case all the rights they would have had by demurring to the said statement of claim.

5a. The defendants further say that Her Majesty being such trustee as is above mentioned, the said causes of action in the statement of claim mentioned did not, nor did any of them or any part thereof accrue to the plaintiff within ten years next before the commencement of this action.

6. The defendants also submit that they cannot be ejected from such lands for the reasons above given, and that the plaintiff's claim is only for compensation, and to oblige the fixing of said compensation by arbitration.

7. The defendants further say that the consent of the Lieutenant-Governor in Council was not under all the circumstances necessary, as is alleged in the said statement of claim.

The plaintiff demurred to the above paragraphs of the statement of defence, on the following grounds:

1. That the assent of the University and Colleges to the Grand Junction Railway Company taking the lands in question for the purpose of their railway, conveys no title to the defendants, and is no answer to a claim for ejectment.

2. That the statement that the Grand Junction Railway Company complied with the requirements of the statutes relating to the said company for the construction of their railway, and took possession of the said lands thereunder, is not specific enough nor definite, inasmuch as several and distinct proceedings under the statute are pointed out as regulating and governing the expropriation of lands by the defendants' railway according to different circumstances that may exist.

3. That the defendants should set out specifically what the said statutes are, and what particular proceedings they

took under them to acquire a right to the possession of the lands in question.

4. That it is no defence to allege that the causes of action in the said statement of claim accrued more than six months before the commencement of this suit, inasmuch as the plaintiff's claim is not for such damages or injury as is barred in six months.

5. That it is no defence to allege that the causes of action in the said statement of claim accrued more than six months before the commencement of this suit, inasmuch as the plaintiff is Her Majesty, being trustee for the University and colleges at Toronto (as is alleged by the defendants), and Her Majesty is not barred by the provisions of the statutes relating either to the Grand Junction Railway Company or to the defendants.

6. That it is no defence to allege that the causes of action herein did not, nor did any of them, or any part thereof accrue to the plaintiff within ten years next before the commencement of this action, inasmuch as it requires sixty years to bar the Crown (even as trustee as alleged) in ejectment, and a lapse of ten years does not bar the Crown as aforesaid in an action for trespass.

7. That the defendants do not allege any reason for dispensing with the consent of the Lieutenant-Governor in Council, as alleged in the statement of claim.

And on other grounds sufficient in law to sustain this demurrer.

The demurrer was argued November 22nd, 1882, before Boyd, C.

J. A. Paterson, for the plaintiff. The statement of defence sets up an expropriation, but the particular mode of expropriation should be shewn, but is not : *Forsyth v. Bristowe*, 8 Ex. 347. The consent of the Lieutenant-Governor in Council should be alleged. It also sets up that six months have elapsed since the torts complained of, and ten years since possession taken of the land as a bar to the plaintiff's right to relief. Neither of these facts is any defence to an

action by the Sovereign. I refer to R. S. O. ch. 165, sec. 34; *The Corporation of the Township of Brock v. The Toronto and Nipissing R. W. Co.*, 37 U. C. R. 372. Here the tort is a continuing injury. I refer also to R. S. O. ch. 1, sec. 8, sub-sec. 6. Sec 9, sub-sec. 3, is the only section of R. S. O. ch. 165, relating to the Queen. The Statute of Limitations was held to be no defence to an action by the Crown: *Regina v. Williams*, 39 U. C. R. 397. The fact of the Queen being a trustee makes no difference.

J. Bethune, Q.C., for the defendants, the Midland Railway Company. As to the first ground argued, the defence is well pleaded. I refer to paragraphs two, three, and four of the statement of defence. The land is alleged to have been taken with the assent of the bursar. Rule 128 shews what is required to be alleged: *The Corporation of the County of Welland v. The Buffalo and Lake Huron R. W. Co.*, 31 U. C. R. 539. The bursar was the proper person to consent. It is not necessary to allege the consent of the Lieutenant-Governor in Council: that cannot be investigated after such a lapse of time. The Legislature has recognized the legal status of this railway by statute: *McLean v. Great Western R. W. Co.*, 33 U. C. R. 198. This action is in effect one of trespass, and does not lie: *Detlor v. Grand Trunk R. W. Co.*, 15 U. C. R. 595. The trespass is not a continuing one. R. S. O. ch. 211, sec. 1, shews this is a trust; secs. 3 and 7 give powers to the bursar to manage and to convey the land. The decision of *Regina v. Williams* is open to question, as all the authorities on the point were not cited to the Court. *The President, &c., of St. Mary Magdalen v. The Attorney-General*, 6 H. L. 189, is opposed to that decision, and was not referred to. In this case the trust is a charitable trust as pertaining to education, and not within the *Nullum Tempus Act*. The plaintiff has no *locus standi*. The action should have been brought by the University as plaintiffs. The Crown at all events is bound by the Railway Acts.

D. Black, for Bickford and others, third parties, referred to 37 Vict. ch. 43, sec. 1, (O.); R. S. O. ch. 108, sec. 29; R. S. O. ch. 165, sec. 20. He submitted that the defence was sufficiently pleaded.

J. A. Paterson, in reply. The bursar is only a ministerial officer. *The President, &c., of St. Mary Magdalen v. The Attorney-General, supra*, is distinguishable from this case, There the Crown intervened as *parens patriæ*, the legal estate was vested in the rector; here the legal estate is in the Crown.

December 1, 1882. BOYD, C.—The plaintiff demurs to certain paragraphs of the answer numbered 3, 4, 5, 5a, 6, and 7, on several grounds set forth. By Rule 189 the demurrer is to be to any pleading or any part of a pleading setting forth a distinct ground of defence. There are two distinct lines of defence set up in these paragraphs, *first* that the railway some ten years ago, with the assent and permission of the University and colleges, and the bursar as agent in that behalf, entered upon and took possession of the lands in question for the purposes of their railway under the statutory powers enabling them to expropriate the land, and have since retained and now are in possession thereof, and submitting that the sole remedy for the plaintiff is to recover compensation; and, *second*, setting up the Statute of Limitations. Several objections were urged to the *first* ground of defence, as that the pleading is vague and indefinite as not setting out specifically what steps were taken to acquire the land, and that in particular it should appear that the consent of the Lieutenant-Governor in Council had been obtained. It appears to me impossible to dispose of the defences of fact raised in these paragraphs by means of a demurrer. The case will have to go to trial, and it is a waste of time to discuss questions that will not advance the disposal of the case on the merits. Dealing with the first distinct defence, it is not open to general demurrer. The third paragraph says in effect the lands were taken by and for the railway with the assent of the *cestuis que*

trustent. By the University Act, R. S. O. ch. 211, sec. 1, the lands were vested in the Crown in trust for the uses of the University and Colleges, but to be managed and administered under the orders of the Lieutenant-Governor in Council by an officer called the bursar. The bursar, and the same person who is pleaded to have assented to the expropriation, is the relator. The practice here pursued is the proper practice as laid down in Lord Redesdale's Treatise, p. 22, (a) in cases where the rights of the Crown are not immediately concerned. Informations then proceed upon the relation of some person or officer who is answerable for the costs. In a passage cited with approval in *Attorney-General v. Vivian*, 1 Russ. 226, Lord Redesdale proceeds: "The relator in reality sustains and directs the suit, and he is "answerable to the Court and the parties for the propriety of the suit, and the conduct of it: although in form all is done in the name of the Attorney-General."

Remembering this it would seem rather unreasonable that the Attorney-General should be set in motion upon the relation of the same officer who assented to the commission of the acts now complained of. It is to be assumed on the demurrer that the bursar knew and assented to what was being done in conformity with the powers and responsibilities devolving upon him under his commission.

The fourth paragraph is not objectionable upon demurrer on the ground of want of certainty. This paragraph is in truth merely responsive to what is found in the amended statement of claim in paragraph eight, where it is alleged that the defendants before taking possession of the land did not comply with the requirements contained in the statutes relating to the company, and in particular did not obtain the consent of the Lieutenant-Governor in Council, as provided by the same. The defendants traverse that in almost co-extensive terms. Both counsel agreed that

(a) A Treatise on the Pleadings in Suits in the Court of Chancery, by English Bill, by John Mitford, Esq., (the late Lord Redesdale,) 5th ed.

the manner of expropriation was provided for as to this company by the terms of the General Railway Act. That such a plea is not open to demurrer is shewn by *Beaver v. The Mayor, &c., of Manchester*, 8 E. & B. 44 (1857,) where the Court intimates that if the plea was uncertain an application might have been made in Chambers similar to that, I suppose, which succeeded in *Forsyth v. Bristowe*, 8 Exch. 347 (1853.) In *Corner v. Sweet*, L. R. 1 C. P. 461, Willes, J., adverts to the old rules of law, when special demurrers were in fashion. A distinction was then made between the averment that the act was done *contra formam statuti* or *secundum formam statuti*; in the latter case the general averment that the act was done according to the form of the statute was almost always held to be sufficient, and under it, it being an averment of fact, a compliance with the statute might be proved, and it was not open to special demurrer. He proceeds to point out that under the modern practice (in 1866) if the plea is insufficient on the grounds here advanced, and therefore embarrassing that the only way of objecting, is, by applying to a Judge to amend it, (p. 462.) The proper remedy for ambiguous and uncertain pleading is not by demurrer, but by an application in Chambers. The provision to that effect in the Common Law Procedure Act was passed for the very purpose of putting an end to such demurrers: R. S. O. ch. 50, sec. 120; per Jervis, C. J., in *Schenk v. Godt*, 1 C. L. R. 116 (1853.) To the same effect are cases cited in *Abell v. McLaren*, 31 C. P. 517. Then can it be that the effect of the Judicature Act is to restore the era of special demurrers, with all their concomitants of delay, and expense, and discussion, and decisions of matters eminently unmeritorious? I think the question answers itself.

Besides, part of the fourth paragraph demurred to affords a good defence in law where the action is for the recovery of land, and the defendant is in possession. In such a case all the defence may be, "I am in possession." These words are to be found in this paragraph, and so the demurrer fails,

as they put the plaintiff to proof of his cause of action. See Rule 144: *Danford v. McAnulty*, L. R. 6 Q. B. D. 645, (b).

I see nothing in the Railway Act requiring the assent of the Lieutenant-Governor in Council to the taking of these lands. That Act relates to public lands vested in the Province (R. S. O. ch. 165, sec. 9, sub-sec. 3), and nothing in the act relates specially to land held in trust by the Crown for collegiate or educational bodies. There is no direct dealing contemplated by that Act between the Lieutenant-Governor and the company as to such lands. Under the University Act it may be that the assent of the Lieutenant-Governor in Council is requisite to put the bursar in motion, but that is a point not raised properly on this record. Apart from these considerations, if the facts are as pleaded, that there has been a user of this land for ten years, (coupled with legislative recognition of the status of the company) and if the taking of it was with the assent of the University and Colleges and bursar, then I think the observations made by all the Judges in *The Corporation of the County of Welland v. The Buffalo & Lake Huron R. W. Co.*, 30 U. C. R. 147, and in App. 31 U. C. R. 539, apply to induce the conclusion that the formal consent of the Crown was dispensed with; and that trespass or ejectment will not lie, and that all that can be claimed is compensation.

The plaintiff is not entitled to sever the fifth paragraph of defence from the third paragraph, and if both form a sufficient answer, as I incline to think they do, then his demurrer fails: *Nathan v. Batchelor*, W. N., 1876, p. 172. The same observation applies to paragraphs six and seven demurred to. If read with the other clauses pertaining to the same ground of defence, I do not think they are demurrable, and by Rule 189 the plaintiff can only demur to that part of a pleading which sets up a distinct ground //

(b) Since affirmed on appeal to the House of Lords, L. R. 8 App. Cas. 456.

of defence. All the allegations making up that line of defence are to be read cumulatively as against partial demurrers.

The only other question is that arising on the Statute of Limitations, and whether the Crown being a trustee for the University is, as such trustee, barred of the right to the land by a ten years' adverse possession. I think I am bound by *Regina v. Williams*, 39 U. C. R. 397, expressly deciding that the Crown is not barred though a trustee. I was asked to reconsider the grounds of decision in that case, because *The President, &c., of St. Mary Magdalen v. The Attorney-General*, 6 H. L. 189, was not then cited. But an examination of the facts of that case shews its inapplicability as an authority governing this.

It does not appear very clearly in whom the legal estate of the charity property then in question was at first vested, (see *Attorney General v. Magdalen College*, 18 Beav. 224, 235, 238,) but it was considered that the legal estate had become vested in the defendants by virtue of the instruments set forth, and it is very plain that the Crown was never the holder of that estate, so that it does not define the position or limit the rights of the Crown when holding the legal estate in lands as a trustee for the public, or for charitable or corporate bodies. In the present case, as opposed to *The President, &c., of St. Mary Magdalen v. The Attorney-General*, Her Majesty is the real plaintiff through the medium of the Attorney-General: (6 H. L. 189.)

In *Regina v. Bayly*, 1 Dr. & War. 213, Sugden, L. C., had to consider the effect of the Irish Statute of Limitations on a recognizance to the Crown, where the debt sought to be recovered was not a real debt to the Crown, and where Her Majesty was a mere formal plaintiff having no beneficial interest. The Lord Chancellor laid down principles applicable here, as for instance thus: "It is a settled principle, established in the earliest cases, that the Crown is not bound by any Statute of Limitation, unless expressly included." He proceeds later on to say the Crown in

matters of this kind acts as a trustee for the public, a royal trustee, and no reason could be assigned for supporting the rights of the Crown which would not equally apply to a case of this nature, where the Crown acts as a royal trustee; and he comes to the conclusion that the Crown having taken the recognizance as a royal trustee for the benefit of the parties to the suit in which it was taken was not bound by the Act of Parliament.

The same question arose and was decided in the same way in *Regina v. Guinness*, 3 Ir. Ch. R. 211, by Brady, L. C., where it was held that no distinction exists as to the privilege of the Sovereign, whether the property be held by the Crown as representing public or private interests, or by the Crown in virtue of the prerogative.

I think *Regina v. Williams*, well decided, and allow this ground of demurrer. As both parties have partially succeeded, there will be no costs.

[CHANCERY DIVISION.]

BEEMER V. OLIVER ET AL.

Estoppel—Accepting a dividend at sale by an assignee of an insolvent.

The plaintiff, an execution creditor, purchased at a sheriff's sale under execution, certain lands of which the registered title was then in the execution debtor; but in a subsequent suit, by the assignee in insolvency of the husband of the execution debtor, to which, however, the plaintiff was no party, the conveyances whereby the lands had been transferred from the insolvent to his wife, the execution debtor, were declared fraudulent, and the assignee thereupon proceeded to sell the lands as part of the estate of the insolvent, the present plaintiff attending at and forbidding the sale. At this sale the defendant became the purchaser, and the proceeds of this sale, together with the other assets of the insolvent estate, were distributed by the assignee, and the plaintiff, being also a creditor of the insolvent, accepted a dividend in common with the other creditors.

Held, that by so accepting the dividend, the plaintiff was estopped from impeaching the sale by the assignee.

THIS was a suit brought by Leamon J. Beemer against Albert Oliver and William Oliver, seeking recovery of possession of certain lands and mesne profits as against the defendant Albert Oliver, who was in possession of the same, and claimed to be entitled to the possession thereof as tenant of the defendant William Oliver. The plaintiff claimed to be entitled to such possession as purchaser at a sale of the lands in question held by the sheriff of the county of Elgin, pursuant to certain writs of *fi. fa.* placed in his hands by the plaintiff himself as execution creditor, under two judgments recovered by him against one Francis L. Isabella Foster in the County Court of the county of Brant, or, in the alternative, the plaintiff claimed to be entitled to a lien on the said lands for the amount of his said executions.

The remaining facts of the case sufficiently appear from the judgment.

The cause was heard at Brantford on September 28th, 1882, before Proudfoot, J.

J. Bethune, Q. C., for the plaintiff. The title in the wife, the judgment recovered against her, the sale, and the sheriff's deed, these give a *primâ facie* right to the plaintiff

to recover. As to the defendants' title, the decree in Chancery was *res inter alios acta*: *Duchess of Kingston's* case; *Smith's* L. C., 2nd vol., 8th ed., 788-9, 794. The right to set a deed aside is in the assignee only, and he cannot assign it; *McMahon's* Insolvent Act of 1875, sec. 39, pp. 79-81. The Insolvent Act of 1875, sec. 16, vests all rights and powers of the insolvent in the assignee, but the insolvent had no power to set this deed aside, and therefore nothing passed by the deed of March 13th, 1879. See *ib.* sec. 76. The deeds of January 2nd, 1878; and of March 9th, 1878, must therefore still be considered valid as against the plaintiff. On the faith of them the plaintiff changed his position, gave time, etc. *Ex parte Kevan*. *In re Crawford*, L. R. 9 Ch. 752; *Brown v. Sweet*, 7 App. 725; and 42 Vic. ch 22, were also referred to.

S. H. Blake, Q. C., and *Hegler*, for the defendants. The plaintiff is not in a position to impeach the deed of March 13th, 1879, to W. Oliver. He knew of the sale by the assignee, and in receiving a dividend actually received a portion of the purchase money. It is a clear case of estoppel. The judgment of November 20th, 1878, is *prima facie* evidence of fraud, and stands till impeached: *Eccles v. Lowry*, 23 Gr. 167; *Allan v. McTavish*, 28 Gr. 539; *Taylor on Evidence*, 6th ed., sec. 1480; *Bump on Fraudulent Conveyances*, 1st ed. p. 539; *Freeman on Judgments*, sec. 418; *Broom's Legal Max.*, 7th Am. ed., 958; *Bullen v. A'Beckett*, 1 Moo. P. C. N. S. 223. As to the exclusive right of assignee, I refer to *Re Andrews*, 2 App. 24. We also cite *McIntyre v. Shaw*, 12 Gr. 295; *McQuestien v. Campbell*, 8 Gr. 242; *Boswell v. Graveley*, 16 Gr. 523; *Greenshields v. Barnhart*, 3 Gr. 1, S. C. 5 Gr. 99; *Emmett v. Quinn*, 27 Gr. 420; *Black v. Fountain*, 23 Gr. 174; *Fleury v. Pringle*, 26 Gr. 67; *Forrest v. Laycock*, 18 Gr. 611; *Totten v. Douglas*, 15 Gr. 126, S. C., 16 Gr. 243; *Allan v. Clarkson*, 17 Gr. 570; *Little v. Hawkins*, 19 Gr. 267; *Smith v. Hurst*, 10 Ha. 30; *Goldsmith v. Russel*, 5 DeG. M. & G. 547.

J. Bethune, Q. C., in reply. *Re Andrews, supra*, is in favour of the plaintiff. *Millar v. Hamelin*, 2 O. R. 103, answers the argument as to estoppel. I also refer to *Proudfoot v. McCrae*, 6 O. S. 502; *Reaume v. Guichard*, 6 C. P. 170; *Mitchell v. Greenwood*, 3 C. P. 465.

January 10th, 1883. PROUDFOOT, J.—The plaintiff was an execution creditor of Frances L. Isabella Foster, and placed writs against lands in the sheriff's hands in July, 1878. The lands in question then appeared on the registry to belong to the defendant in these suits by a deed from her husband, James L. Foster, to one Ostrander, dated January 2nd, 1878, and a deed from Ostrander to the said defendant, dated March 9th, 1878, both registered April 20th, 1878.

The sheriff sold under these writs, and Beemer, the execution creditor, bought the lands in question, and a deed was made to him on August 28th, 1880, registered September 18th, 1880.

James L. Foster became insolvent on June 13th, 1878. The assignee proceeded in Chancery to have the deed from J. L. Foster to Ostrander and that from Ostrander to Frances L. I. Foster set aside as fraudulent against creditors, and obtained a decree on November 20th, 1878, setting them aside. But to that suit the present plaintiff was no party. The assignee afterwards sold to the defendant W. Oliver these lands, and conveyed them to him by deed dated March 13th, 1879, registered March 18th, 1879, and the defendant W. Oliver claims the benefit of the registry law, his deed being registered prior to the plaintiff's.

The estate of Foster paid 14c. in the dollar, and all the assets were realized, including the purchase money received from Oliver.

The plaintiff Beemer placed his claim in insolvency, and received the same dividend as the other creditors.

Many objections were made to his recovery in this suit, which I have not thought it necessary to consider, but there was one which appears to me fatal to his case. By

his acceptance of the dividend, paid in part out of the proceeds of the sale by the assignee in insolvency, I think he is estopped from taking proceedings to set aside the sale.

It is true that Beemer attended at the sale by the assignee and forbade the sale, but he subsequently accepted the dividend.¹

It is said to be universal law that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, though it could not have been lawfully done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act he has so sanctioned to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct. And again, if a party has an interest to prevent an act being done, and acquiesces in it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have, had it been done by his previous license: *Cairncross v. Lorimer*, 7 Jur. N. S. 149. Or, as it was said in another case, the rule of law is clear that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act in that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time: *Pickard v. Sears*, 6 A. & E. 468; *Freeman v. Cooke*, 2 Ex. 654. So where a bankrupt had taken a part in the sale of his own effects he was precluded from contesting the validity of the bankruptcy at law: *Clarke v. Clarke*, 6 Esp. 61. And where a bankrupt who had abandoned a petition presented for a supersedeas, and joined in a conveyance of part of his property, solicited and procured the requisite signatures to his certificate, he was restrained from proceeding in an action against the messenger to try the validity of the commission: *Ex parte Cutten*, 1 G. & J. 317. And see numerous cases collected in *Bigelow on Estoppel*, 2nd ed., ch. 18, p. 431.

The conduct of the plaintiff in this case, in accepting a dividend out of the proceeds of the sale of the lands in question by the assignee, was calculated to lead, by fair inference from his conduct, to the belief that he acquiesced in the sale, and the assignee was induced to do what he would otherwise have abstained from doing, viz., to declare and pay a larger dividend than the estate would have justified without the proceeds of that sale. The case is thus brought within the very terms of the judgment in *Cairncross v. Lorimer*, 7 Jur. N. S. 147. Nor is it any objection that the assignee is not a party to the present action. The defendant is the purchaser from the assignee, and entitled to avail himself of any defence the assignee would have had: *Bigelow* on Estoppel, 2nd ed., p. 442.

But I was referred to a decision of Mr. Justice Osler as holding that in such a case the creditor was not estopped from impeaching the sale: *Miller v. Hamelin*, 2 O. R. 103. There are some expressions of the learned Judge that would seem to favour the conclusion that an insolvent, after obtaining his discharge, who had purchased the claims of the creditors on the estate, and upon whose petition an order had been made for the sale, and the sale had been carried out, and who received dividends out of the proceeds, might still insist upon a title adverse to the assignee. But this was not necessary to the decision, and is treated by the learned Judge as a matter of less importance. For he says a more important question is, whether there is any evidence of an acknowledgment of the mortgagee's title sufficient to interrupt the running of the statute, and he held that if the insolvent were a person who could give an acknowledgment, that such an acknowledgment had been given. But he said that the insolvent when he took the assignment of the Marchand mortgage had obtained his discharge, and was in point of fact a stranger to the estate, and might acquire the estate of the mortgagee although he had been himself the mortgagor, and having done so he could convey it, as he had done, so as ultimately to vest it in his wife, by a deed of May, 1869, and that no acknowledgment by

the husband subsequent to that period could affect her title, the sale by [the assignee not taking place till February, 1881.

There may be cases in which a party so conducting himself, and desiring to put himself in a position to dispute the title given by the assignee, might ask to be relieved from the consequence of his act as founded in error or mistake, and offer to refund the money; but that is not the case here. It is simply a question whether he can hold the proceeds of the sale of the land and have the land too. I think he cannot; and dismiss the action, with costs.

[COMMON PLEAS DIVISION]

RADFORD V. THE MERCHANTS BANK.

*Banks and banking—Sale of machine by bank—Warranty—34 Vic. ch. 5 (D.)
—Division Courts—Res judicata.*

By the Banking Act, 34 Vict. ch. 5 (D.), banks are prohibited from buying and selling goods or merchandize :

Held, therefore, that an action would not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine.

In an action in the Division Court against the now plaintiff, on notes given by him for the price of the machine, the question of the warranty was tried and decided against the now plaintiff. *Held*, that the matter was *res judicata*, and the judgment in the Division Court was therefore a good defence, by way of estoppel, to the present action.

THIS was an action brought to recover damages for breach of warranty on the sale of a horse-power machine, by the agent of the defendants at Kingston.

The only parts of the statement of defence now material are the eighth and eleventh paragraphs.

The eighth paragraph was, that the said manager of the defendants at Kingston, mentioned in the sixth paragraph of the statement of claim, had no authority from the defendants to make any representations in the matter; and no such representations are binding upon the defendants.

The representation referred to was, that the defendants' manager at Kingston represented to the plaintiff that the defendants had purchased the business of one John Brokenshire, a manufacturer of horse powers, and were manufacturing horse-powers of the said John Brokenshire make and had them for sale, and that he recommended them highly.

The eleventh paragraph set up in substance, that, in an action in the First Division Court of the county of Frontenac, upon certain promissory notes given for the price of the machine, the now plaintiff raised the same matters as a defence that he now complains of in this action, namely, the breach of warranty; and that the matters were then considered, adjudicated upon, and determined by the Judge of the County Court of the county of Frontenac, having jurisdiction in the premises, and a decision was given

against the now plaintiff and a verdict thereon was found for the now defendants on the said notes; and that the verdict so rendered is a bar to the present action of the now plaintiff, and the defendants so plead it in this action.

The plaintiff joined issue on the statement of defence. He also demurred to the eleventh paragraph, on the ground that it alleges that the action in the Division Court therein mentioned, and the judgment therein, are a bar to the maintenance of this suit: the said eleventh paragraph does not allege that any claim was made in the said Division Court action by way of counter claim or set off for damages, either general or special, for breach of the warranty, or that the same was adjudicated upon in the said action.

It appeared that John Brokenshire, who was a manufacturer of these machines, became insolvent, and at the time of his insolvency he had three machines unfinished. The bank were creditors of Brokenshire, and they acquired the machines and had them finished, and sold the one in question to the plaintiff for \$140.

The cause was tried before Wilson, C. J., and a jury, at Kingston, at the Fall Assizes of 1883.

There were some nineteen questions submitted to the jury, but the only one necessary to refer to is the fourteenth, which is stated in the judgment.

The jury found upon all the questions in favour of the plaintiff: and the learned Chief Justice entered the verdict and judgment for the plaintiff.

During the Easter Sittings of the Divisional Court, November 22, 1883, *Britton*, Q. C., obtained an order *nisi* to set aside the verdict and judgment for the plaintiff, and to enter a nonsuit or verdict for the defendant.

During the same Sittings, May 30, 1883, *Britton*, Q. C., supported the motion.

E. H. Smythe, (of Kingston,) contra.

The arguments, so far as material, are set out in the judgment.

June 29, 1883.—GALT, J.—The jury found a verdict in favour of the plaintiff on every question left to them amounting to no less than nineteen. Some of the answers are not satisfactory, but unless we were satisfied beyond doubt they were wrong, we could not interfere in a case like the present.

There is, however, one question which if decided in favour of the defendants is fatal to the plaintiff's right to recover. It is raised by the 8th paragraph of the defence, which is: "The said manager of the defendants at Kingston, mentioned in the sixth paragraph of the statement of claim, had no authority from the defendants to make any representations in the matter."

By sec. 40, of the 34 Vic. ch. 5, D., on "Banks and banking," the bank "shall not directly or indirectly deal in the buying and selling of goods, wares, or merchandize."

The transaction, therefore, by which the bank became possessed of the machines mentioned in the evidence was, strictly speaking, contrary to their charter, but their attention was called to it by their agent, who in answer to a question by the learned Judge in reference to it—the question being—"You advised the bank what you were doing?" replied, "From time to time in my statements. I had to give a statement of my assets, and every thing that was done, and would say that we had these machines to apply on the debt, while I had no authority from the bank to finish these machines I acquainted the bank with every thing that was done." And again "Q. Whether it was an authorized or an unauthorized transaction, as far as you were concerned it was a transaction with the bank?" A. "Yes." Q. "Carried on by you as their agent?" A. Yes, Q. "The notes of Radford were all made payable to the bank?" A. "I think they were."

It is true the bank adopted the acts of the bank manager or agent at Kingston by accepting the notes which were given as the price of the machine, and afterwards suing upon them, and on which they recovered judgment against the plaintiff; but notwithstanding their adoption of their

agent's acts, we think they are not themselves liable to the plaintiff upon any warranty which their agent made with respect to this machine.

There are cases which shew that a corporation may be made responsible for a libel published by their authority, and for fraud committed by their agent, and the like ; but when the statute expressly prohibits the defendant from engaging in transactions of this kind, they cannot, by any principle which governs the classes of cases just mentioned, be made responsible upon such dealings because they choose to engage in them, in violation of their charter, nor, for the like reason, should they have recovered upon the notes, which the plaintiff gave to them, as the price of this machine.

In that action no defence of illegality was set up, and the bank recovered judgment, and what was done in that action brings us to the objection taken by the defendant, to the plaintiff's right to recover, as set up in the eleventh paragraph of the statement of defence, that the subject now in question between the parties to this action has been already decided in the action brought by the defendants to enforce payment of the notes. This forms the subject of the fourteenth question submitted by the learned Chief Justice to the jury, which is: "Did the plaintiff, when sued in the Division Court, set up as a defence that the horse power had been warranted, and that it was not worth so much as \$140, and that a deduction should be made from the price, and did the Judge in that case give a decision against the plaintiff upon the facts and merits of the case?" The answer was, "That he did not receive value."

The learned Judge tried to get a more intelligible answer from them, but all he could extract was, "The whole of us agree that it is about as intelligent an answer as we can give, that he did not receive value."

It need hardly be said this was no answer at all. We have had all the papers connected with the Division Court suit submitted to us, also the rule *nisi* for a new trial, and

the learned Judge's considered judgment in discharging it. It is manifest that the question argued before him was that now before us viz., "whether the sale was subject to an implied warranty that the machine was reasonably fit for the use for which it was sold, and to which it was to be applied." His decision was : "I cannot see that there is any warranty to be implied from the evidence in this case;" and the motion was refused.

By the 7th section of the "Division Courts Act," R. S. O. ch. 47 : "The said Division Courts shall not be held to constitute Courts of Record, but the judgments in the said Courts shall have the same force and effect as judgments of Courts of Record."

This paragraph of defence was demurred to, on the ground "that it alleges that the action in the Division Court therein mentioned, and the judgment therein, are a bar to the maintenance of this suit : the said eleventh paragraph does not allege that any claim was made in the said Division Court action by way of counter claim or set-off for damages, either general or special, for breach of the warranty, or that the same was adjudicated upon in the said action."

The demurrer must be overruled. There are no pleadings required in actions in the Division Court, and the ground of defence alleges all that was necessary to shew that the present claim of the plaintiff had been adjudicated upon by the learned Judge. It is true the jury returned such an "intelligent" answer to the question submitted by the learned Chief Justice on the trial of this case that it is no answer at all ; but we have all the evidence that can be produced of what took place in the Division Court suit before us, and therefore are in a position, under the 321st Rule, to give judgment on that ground of defence, and to enter a verdict for the defendants.

OSLER, J.—I agree in the result, on the ground that the bank are by their charter expressly prohibited from buying and selling goods and chattels, and therefore that they cannot be bound by any warranty, express or implied, on the sale by their agent.

I refer to *Taylor v. Chichester and Midhurst R. W. Co.*, L. R. 2 Ex. 356; *Clarke v. Sarnia Street R. W. Co.*, 42 U. C. R. 39, at p. 45; *Lyman v. Bank of Upper Canada*, 8 U. C. R. 354; *Riche v. Ashbury Railway Carriage and Ins. Co.*, L. R. 7 H. L. 653, at pp. 670, 672, 679, 686, 694-5; *Kingsmill v. Bank of Upper Canada*, 13 C. P. 600.

If the defence set up to the action brought by the bank in the Division Court, can be treated under the Judicature Act as a counter claim for damages, for breach of warranty, the sale is not merely *ultra vires*, but prohibited, and the judgment in that Court may be pleaded by way of estoppel as a defence to the present action.

WILSON, C. J., concurred.

Order absolute.

[QUEEN'S BENCH DIVISION.]

REGINA V. McELLIGOTT AND MEYERS.

Conviction—Assault—Stopping carriage by standing in front of horses.

The defendants were convicted for unlawfully assaulting F. V. "by standing in front of the horses and carriage driven by the said V., in a hostile manner, and thereby forcibly detaining him, the said V., in the public highway against his will."

Held, that the conviction was bad in stating the detention as a conclusion and not as part of the charge, which, as shewn by the conviction, was merely standing in front of the horses, and did not amount to an assault.

On the 26th of October, 1883, *Creelman* moved to quash the conviction herein. The information alleged that the defendants, on the 21st of June, 1883, at the town of Pembroke, did unlawfully assault Frank Viancour, a teamster in charge of a pair of horses, the property of the informant John Dunlop, thereby putting certain ladies who were in the carriage drawn by the said horses, as well as the said Frank Viancour, in bodily terror. The defendants were convicted, and separate convictions were drawn up in the following form: "For that he, the said defendant, on, &c., at, &c., unlawfully did assault Frank Viancour, by standing in front of the horses and carriage driven by the said Viancour, in a hostile manner, and thereby forcibly detaining him the said Viancour in the public highway against his will, contrary to the statute in such case made and provided, John Dunlop being the complainant."

Aylesworth, shewed cause.

The following authorities were cited: *Bird v. Jones*, 7 Q. B. 742; *Russell on Crimes*, 5th ed., 956 *et seq.*; *Dodwell v. Burford*, 1 Mod. 24; *Innes v. Wylie et al.* 1 C. & K. 257.

October 30, 1883. WILSON, C. J.—The argument was, that an assault was committed on Frank Viancour "by the defendants standing in front of the horses and carriage driven by the said Viancour in a hostile manner, thereby forcibly detaining him the said Viancour in the public highway against his will."

It was said to be an assault, because these facts, it was said, constituted an imprisonment, and an imprisonment necessarily included an assault.

The case of *Bird v. Jones*, 7 Q. B. 742, shews that an imprisonment means an entire restraint upon the will of the person detained to move at his free will in any direction, or compelling one to go in a particular direction against his will. "Imprisonment is a total restraint of the liberty of the person for however short a time, and not a partial obstruction of his will, whatever inconvenience it may bring on him;" and "standing in front of the horses and carriage driven by Viancour," although he was "thereby forcibly detained on the highway against his will," is not, in my opinion, an imprisonment.

If the conviction had been that the defendants stood in front of the horses *and* carriage, and forcibly detained him, &c., *that* whole matter would have constituted the charge of assault; but standing in front of the horses, *thereby* forcibly detaining the driver, does not make the latter statement parcel of the charge; for "thereby forcibly detaining the driver" is the conclusion which is drawn from the fact of standing in front of the horses. It is a matter of law whether standing in front of the horses is, as the conviction is drawn, a forcible detention of the driver; and being stated as a matter of law, the question is, whether the inference from the preceding facts or charge alleged is one which is warranted from such facts or charge, and I am of opinion it is not. The *virtute cujus* is not traversible unless it involve matters of fact: *Lucas v. Nockells*, 10 Bing. 157. *Thereby* may be a conclusion of law from preceding facts: *Brown v. Mallett*, 5 C. B. 599. It may in some cases be an averment of fact: *Pryce v. Belcher*, 3 C. B. 58. The facts do not shew an assault to have been committed.

It is not stated in the conviction that the defendants put their hands or by any other means than by mere passive resistance detained the driver in the highway; in which case *Innes v. Wylie*, 1 C. & K. 257, applies.

It was contended that an assault upon the horses of one who is driving, or a battery of them, would be an assault or battery upon the driver, and *Dodwell v. Burford*, 1 Mod. 24, *S. C. W. Jones* 444, was cited. In that case the charge was that the defendant committed a battery of the wife according to the report in *W. Jones*, 444; but in 1 Mod. 24, that the defendant committed a battery of the horse on which the wife was riding, so that the horse ran away with her, whereby she was thrown and another horse ran over her, whereby she lost the use of two of her fingers; and the declaration was held to shew a battery of the wife in law. See also *Gibbons v. Pepper*, 1 Ld. Ray. 38, and the rule in *Scott v. Shepherd*, 2 Wm. Bl. 892. But the battery of the horse on which one is riding is not a battery of the rider. *Slats v. Swann*, 2 Str. 872, is an authority, if authority be required, for such a proposition. I am of opinion the conviction cannot be sustained, and must be quashed.

Conviction quashed.

[QUEEN'S BENCH DIVISION.]

FARMER V. HAMILTON TRIBUNE PRINTING AND
PUBLISHING CO. ET AL.

*Libel and slander—Public newspaper—Justification—Public benefit—
Demurrer.*

To a statement of claim, charging the defendants with the publishing of the plaintiff in their newspaper that he had seduced and betrayed one B. P., and was a man unfit for the society of respectable people, &c., whereby the plaintiff was injured in his credit, &c., the defendants pleaded that the article was published *bona fide* and without malice, and for the public benefit, and in the usual course of the defendants' duty as public journalists, and was a correct, fair, and honest report of proceedings of public interest and concern.

Held, on demurrer, bad, for the publication complained of was in no sense for the public benefit, nor published in the course of defendants' duty.

STATEMENT OF CLAIM.

THAT on the 14th June, 1883, the defendants falsely and maliciously printed and published, or caused to be printed and published, of and concerning the plaintiff, and of and concerning him in his profession (*sic*) as a photographer, in a newspaper called *The Evening Tribune* and *The Hamilton Evening Tribune*, an article or paragraph in the words following, that is to say:—

“Poor Bella Payne.” “The deceased young lady’s interment yesterday.” “Letter from her mother, Mrs. Murray.”

“The pleasure seekers going to and from Dundurn yesterday about five o’clock might have noticed an undertaker’s wagon in which were seated two men on the way up York street. This wagon contained the mortal remains of an accomplished young lady, the daughter of highly respected parents, and one who but a short time ago commanded at once the esteem and love of all who knew her. In an unguarded moment she listened to the voice of the seducer, and, like thousands of others of her sex, fell a victim to his wiles. Of all the friends who knew Miss Payne during life, not one was found to follow her poor remains to the grave, and she was buried in Burlington cemetery without a stone to mark the spot of her last

resting place. Her mother was in the city till after the interment, but left last night for her home, carrying with her a terrible load of sorrow. Indeed, Mrs. Murray's actions and appearance would lead one to believe that she was partly demented at the terrible ordeal through which she had to pass.

"The following letter signed by her has been handed us for publication :

"As the mother of Bella Payne, in justice to Mr. Millman (meaning the defendant Millman) whose name is connected with the newspaper articles, I wish to state that from all the information I could obtain from the most reliable sources, the blame attaches solely to Mr. Thomas Farmer (meaning the plaintiff.) I wish, also, further to say, that the legal proceedings were taken on my written instructions, and not by Mr. Millman.

"E. F. MURRAY."

Meaning thereby that the plaintiff was the seducer to whose voice the said Bella Payne had listened, and to whose wiles she had fallen a victim; and that the plaintiff was guilty of having seduced and carnally known the said Bella Payne: that he had artfully and wickedly deceived her, and had finally betrayed her, and was a man unfit for the society of respectable people, either in his business as a photographer or otherwise; whereby the plaintiff had been greatly prejudiced and injured in his credit and reputation, and in his business profession (*sic*) as a photographer, and had been otherwise greatly injured.

STATEMENT OF DEFENCE.

7. The said article was published by the defendants The Hamilton Tribune Printing and Publishing Company, *bond fide* and without malice, and for the public benefit, and in the usual course of the said defendants' duty as public journalists; and was a correct, fair, and honest report of proceedings of public interest and concern.

Demurrer:—That the 7th paragraph contained no justification.

October 23rd, 1883.—*Thos. Robertson*, Q. C., for the demurrer.

[*Lash*, Q. C., contra.

October 23rd, 1883. WILSON, C. J.—I have no kind of doubt that the seventh paragraph of the statement of defence in question is unsustainable. The defendants had no right to publish the article complained of. It was in no sense for the public benefit, nor in the course of the defendants' duty as journalists to publish such matters.

I give judgment for the plaintiff on demurrer, with costs, with leave to defendants to amend the seventh paragraph as they may be advised within two weeks.

Judgment for plaintiff on demurrer.

[CHANCERY DIVISION.]

THE MERCHANTS BANK V. THOMPSON.

MALLON V. CRAIG.

Partnership—Co-partners—Syndicate—Pooling profits and losses—Agreement—Execution of deed—Election—Estoppel—Misrepresentation—Fraud—Indemnity—Failure of consideration.

Eight persons, who had previously been engaged in the cattle trade, held a meeting in the month of October, 1880, and passed a series of resolutions, prefaced by the declaration that they and four others, whose names were mentioned, proposed to form a cattle dealers' syndicate for the purpose of exporting cattle, to commence with the opening of navigation, from Portland. The resolutions provided that each member of the syndicate should make a deposit of \$5,000 to the credit of the representative of each company :

That no member of "this firm" should do any business outside of the syndicate in export cattle except for the benefit "of the company:"

That no member of the syndicate should appoint any person to buy cattle except approved of by the majority of the members :

That each member should take the position assigned him by the majority of the syndicate :

That the syndicate should be divided into two companies, each to consist of six members (whose names were mentioned) :

That no member should be admitted to the syndicate without the approval of all the members :

That none of the cattle space which was then taken should be sub-let without the approval of the syndicate :

That the profit or loss should be equally divided, share and share alike, between all the members of the syndicate :

All the contemplated members of the proposed syndicate except one signed the resolutions. One of the firms was already in existence, the other was to be thereafter formed. The one already existing comprised six members of the proposed syndicate, and was called Thompson & Co., the other subsequently formed was composed of five members of the proposed syndicate, and was called Craig & Co. These two firms proceeded to buy and export cattle ; each opened separate bank accounts. The firm of Craig & Co., dealt with the plaintiffs and obtained advances. From the evidence it appeared that the plaintiffs had knowledge of the resolutions above referred to, but opened the account solely with the firm of Craig & Co., and the members of that firm, from whom alone they took security ; and it appeared by the evidence that, notwithstanding the form of the resolutions, the arrangement contemplated thereby was treated by the parties as still open and as a matter of negotiation to be completed by some future agreement between the parties, and to perfect which meetings were from time to time held ; and afterwards, at a subsequent meeting of some of the members of the firm of Craig & Co., and Thompson & Co., on April 20th, 1881, a formal agreement was drawn up, purporting to be made between the individuals composing the firm of Thompson & Co. of the first part, and the individuals composing the firm of Craig & Co. of the second part, which provided for the two firms carrying on their business of cattle exporters in co-operation with each other, and for dividing between the two firms the net profits and

losses of the two firms respectively. from December 8th, 1880, and containing a declaration that neither company should be liable for any debts or liabilities of the other company, and that nothing therein contained should create a partnership between the two companies.

This agreement was signed by all the parties except two of the members of Thompson & Co., who refused to sign it. The two firms continued to carry on business as cattle exporters, each on its own account.

A paper purporting to be a copy of the agreement was furnished to the plaintiffs by Craig & Co., whereby it appeared to be signed by all the parties to it. But the plaintiffs were subsequently informed of the refusal of the two to sign it, and thereafter made further advances to the firm of Craig & Co.

Held, that the refusal of two of the members of the firm of Thompson & Co. to sign the agreement of April 20th, 1881, rendered it in-operative, not only as to those refusing to sign it, but also as to those who had signed it, and that until all had signed it was not a completed agreement.

Held, also that those who actually signed the agreement could not thereby bind their co-partners who did not sign it.

Held, also, that even if the agreement had been completed it did not constitute a partnership between the two firms, so as to enable one firm to pledge the other firm's credit, for advances in carrying on the trade.

Held, also that the provision for sharing profits and losses, which in an ordinary trading association where there is a community of capital and stock-in-trade, and a common undertaking, is conclusive evidence of a partnership, is nevertheless not a conclusive test of partnership where there is an extraordinary adventure between two partnerships presenting a well defined and well known separation of interests and ownerships.

Held, also, that the way in which the profit is to be participated in is the essence of the matter, and that when the right to call for a proportion of the profits arises by virtue of an express contract to that effect, which would not otherwise flow from the relations of the parties, the right exists *qua* debt, and not by virtue of a partnership.

Held, also, that even assuming that the agreement of April 20th, constituted a partnership between the two firms, yet that the plaintiffs, with knowledge of all the facts, by electing to give credit to Craig & Co. alone, were precluded from thereafter resorting to Thompson & Co.

Where one M. was induced to become a member of a firm, on the faith of representations made to him that the previous losses of the firm only amounted to \$18,000, but it subsequently turned out that such losses amounted to about \$22,000 or \$24,000.

Held, that M. by reason of such misrepresentation was entitled to be relieved from such agreement, and to be indemnified by the other members of the firm against all liabilities incurred by him as such partner, prior to the discovery of the untruth of the representations made as to the losses of the firm.

Held, also, that M. having become a partner also on the faith that the firm in question intended to form a syndicate arrangement with another firm, which arrangement failed to be carried out for want of the concurrence of some of the members of such other firm, he was on that account also entitled to be relieved from his agreement to become a partner.

THESE two actions were by consent tried together. The first action of *The Merchants Bank v. Thompson* was brought by The Merchants Bank of Canada, plaintiffs, against A. J. Thompson, C. Flannagan, A. M. Aikins, E. Blong, G. F. Frankland, M. J. Woods, Robert Craig, W.

Craig, N. Kennedy, E. B. Morgan, William McLean, and John Mallon, defendants. The writ issued on August 24th, 1881.

The plaintiffs claimed to recover from the defendants \$52,000, being the amount alleged to be due in respect of certain advances alleged to have been made to the defendants as partners.

The statement of claim alleged that for some time prior to January 1st, 1881, until June 30th, 1881, the defendants had been largely engaged together as co-partners in the business of buying and selling cattle: that the partnership agreement was not reduced to writing until April 20th, 1881, when it was reduced to writing, and the writing shown to the plaintiffs immediately thereafter: that advances for the purposes of the business were made, both prior and subsequent to the date of the agreement being shewn to the plaintiffs: that a large amount having become due a settlement was made with the defendants on May 20th, 1881, and the amount of the indebtedness fixed at \$58,000, which had since been reduced by payments to \$50,000.

The plaintiffs alleged that the copy of agreement shown to them purported to be signed by all the defendants, but that the defendants Aikins and Woods claimed that they never executed it, and the plaintiffs charged that even if they did not sign it they were cognizant of it, and concurred therein.

The plaintiffs claimed judgment against all the defendants; or in the alternative against all except Woods and Aikins.

The defendants Robert Craig, W. Craig, N. Kennedy, E. B. Morgan and Wm. McLean, made no defence.

The other defendants put in a statement of defence, in which they alleged, that on or prior to December 8th, 1880, the defendants Robert Craig, Wm. Craig, N. Kennedy, E. B. Morgan, and Wm. McLean, were carrying on business in partnership as cattle dealers under the name of "R. Craig & Co.," and during the same period the defendants Thompson, Flannagan, Aikins, Blong, Frankland, and Woods were carrying on the same kind of business in

partnership, under the name of "Thompson & Co.:" that the defendant Woods was a partner with Mallon in the business of butchers, under the name of "John Mallon & Co.," and although Mallon was not a member of the firm of "Thompson & Co." he was, as between himself and the defendant Woods, interested in the business of that firm: that the firm of R. Craig & Co. had its headquarters at Montreal, but its business operations were largely carried on in the Province of Ontario. Both Thompson & Co. and Jno. Mallon & Co. had their headquarters in Toronto: that a short time prior to April 20th, 1881, "R. Craig & Co.," and "Thompson & Co." entered into negotiations with the view of co-operating in the business, reducing their expenses, sharing equally their profits, and bearing equally their losses, from December 8th, 1880, to June 30th, 1881: that all the members of these two firms except Aikins and Woods were present at a meeting held in Toronto on April 20th, 1881, for the purpose of coming to an arrangement as above mentioned: that at this meeting the position of Thompson & Co. and R. Craig & Co., and their business operations since December 8th, 1880, were discussed, and the book-keeper of Thompson & Co. stated the losses of that firm during that period would only amount to \$18,000, and that Kennedy stated that the affairs of R. Craig & Co. were in about the same position, which was acquiesced in by the other members of that firm. It was then objected by the other members of R. Craig & Co., that as there were only five members in their firm as against six in Thompson & Co., the former were individually running a greater risk, and Mallon, relying on the statements of Kennedy, agreed, if he were paid \$1,000 to become the sixth member of R. Craig & Co., which sum was to be contributed by the other members of the two firms equally. That Mallon received the proportion of the \$1,000 payable by the members of R. Craig & Co., and joined that firm.

An agreement was then drawn up for the purpose of carrying out the arrangement for carrying on the business

of the two firms in co-operation, and pooling their profits and losses, and purporting to be made between the several persons composing the firm of Thompson & Co. of the first part, and the several persons composing the firm of R. Craig & Co. of the second part.

This agreement was signed by all the defendants except Woods and Aikins, who refused to execute it.

It was subsequently discovered that the losses of R. Craig & Co. had amounted to \$30,000, instead of only \$18,000, whereupon the firm of Thompson & Co. and Mallon repudiated the agreement of April 20th, and refused to carry it out, and notified the plaintiffs and the members of R. Craig & Co. of such repudiation; and the defendants denied that the agreement of April 20th, 1881, had ever been completed.

The plaintiffs joined issue.

The action of *Mallon v. Craig* was brought by John Mallon, plaintiff, against Robert Craig, William Craig, N. Kennedy, E. B. Morgan, William McLean, Archibald J. Thompson, Cornelius Flannagan, Andrew W. Aikins, Edward Blong, G. F. Frankland, and M. J. Woods, defendants, who, together with the plaintiff, constituted the firm of R. Craig & Co. And the plaintiff prayed to be relieved from his agreement to become a member of the firm of R. Craig & Co. above referred to, and for indemnity against payment of a draft of \$5,000, accepted by the plaintiff as a member of the firm before his discovery of the untruth of the representations as to the position and losses of the firm of R. Craig & Co., on the faith of which he had agreed to become a member of the firm.

Both cases came on together for trial before Boyd, C., at Toronto, and were proceeded with on May 17th, 18th, and 19th, 1882, and on October 10th, 11th, 12th, 13th, and 14th, 1882, when the trial was finally concluded.

The evidence was very voluminous, but the material parts of it sufficiently appear from the statement contained in the head-note and in the judgment.

C. Robinson, Q.C., S. H. Blake, Q.C., and G. C. Gibbons, for the plaintiff. The case is peculiar. It is claimed by the plaintiffs that there was a partnership between two firms. There is no legal difficulty in the way of this being the case. The partnership, however, was intended to be carried on under extraordinary conditions. The object of the parties was to conceal the existence of the partnership from the public, so as "to keep off" competition by others. They were therefore to carry on their business as though no partnership existed, and were not to have a common place of business. From the nature of the business its affairs were necessarily conducted without any very strict accounts being kept. But for what appears by the documentary evidence the plaintiffs would have difficulty in establishing the existence of the partnership. The character of the writings is important. The document of October 15th is unmistakable evidence of a partnership, it creates an actual partnership, as from December 8th, for the then ensuing season. This document contemplates business being commenced at the opening of navigation at Portland, and the deposit of \$5,000 by each individual of the partnership, whereas the defendants say there was no agreement until the formal instrument was prepared in the following April. But even supposing the legal effect of the agreement of October 15th is doubtful, there can be no doubt that the agreement of April 20th, 1881, created a partnership between the parties. This agreement expressly provides for sharing of profits and losses, which is of itself sufficient to constitute a partnership: *Lindley on Partnership*, 4th ed., 18; *Story on Partnership*, 7th ed., sec. 30, note and sec. 44; *Ex parte Delahassee*, L. R. 7 Ch. D. 511, 527, 532; *Pawsey v. Armstrong*, L. R. 18 Ch. D. 698, 704-5; *Moore v. Davis*, L. R. 11 Ch. D. 261, 265; *Re Randolph*, 1 App. 315, 325, 326, 332, 342; *Mollwo Ward & Co. v. Court of Wards*, L. R. 4 P. C. 419, 435; *Botham v. Keefer*, 2 App. 595, 608; *Waugh v. Carver*, 2 H. Bl. 235, 246; *Holme v. Hammond*, L. R. 7 Ex. 218; *Pooley v. Driver*, L. R. 5 Ch. Div. 472. There was common partnership

property in the "space" which the parties had taken in the different vessels, which was to be for the common use of the partners. They agreed each to put in \$5,000 as a margin against loss. Both these constituted the stock and common property of the partnership. This, however, is not an essential incident of a partnership: *Story* on Partnership, 7th ed., sec. 30. The fact that the agreement of October 15th provided for a more formal document being prepared, did not prevent the first instrument from taking effect at once. To hold otherwise would be dangerous doctrine: *Benjamin* on Sales, 3rd ed., sec. 40; *Chinnock v. Ely*, 4 D. G. J. & Sm., 638, 645; *Bonnewell v. Jenkins*, L. R. 8 Ch. D. 70. We contend there was a clear partnership contract from December 8th, 1880, affirmed by the formal instrument subsequently executed in April. The terms in both documents are essentially the same. They agree that it shall be retroactive. The conduct of the parties too is to be regarded, and it is safer to trust to this than to the oral testimony, which is conflicting. It is admitted that these firms stopped buying in competition with each other. Why was this, if it were not in pursuance of the partnership agreement? See *Pooley v. Driver*, L. R. 5 Ch. D. 458; *McClellan v. Kennard*, L. R. 1 Ch. 336; *Parsons* on Partnership, 2nd ed., p. 89; *Morawetz* on Priv. Corporations, sec. 9. Why did all subsequently sign the memorandum of October 15th, if it was to be of no effect until the formal agreement was drawn up? As it turned out there were only losses; suppose there had been profits. Applying that test to the transaction the plaintiffs' right seems clear.

It is said Aikins and Woods did not sign the agreement of April. Aikins signed the agreement of October 15th, and cannot be relieved from liability because he did not sign the other.

If the agreement be voidable for fraud on the ground of misrepresentation of Kennedy's losses, yet this does not affect the bank till the instrument is in fact rescinded. *Story* on Partnership, 7th ed., sec. 232; *Tournade v. Hage-*

dorn, 5 N. Y. S. C. 288; *Campbell's Sale of Goods and Commercial Agency*, p. 527. If, however, the partnership were actually formed, as we contend, on October 15th then Kennedy's statement as to loss was not material except, perhaps, as to Mallon. The statement did not profess to be absolutely accurate, it is prefaced with the word "about," showing clearly it was intended as, and all parties knew it to be, a mere approximation. Mallon, however, went in on getting \$1,000, and did not act on the faith of the statement of losses. The question is, did the bank act upon the knowledge of the fact that the syndicate was formed? It is clear they did. They were told by the Craigs, and the credit was given in consequence of this information. The plaintiffs were furnished with a copy of the agreement of October 15th, and acted on it, and it cannot be changed by the later instrument to the detriment of the plaintiffs.

D. McMichael, Q.C., *D. McCarthy*, Q.C., *J. E. Rose*, Q.C., and *J. H. Macdonald*, for defendants. The question is one of agency entirely. In other words, did Craig's company negotiate a loan with the plaintiffs as agent of the defendants who compose the firm of Thompson & Co. There were two independent companies, carrying on business apart from each other. If there was a partnership between these two companies, when did it begin? Now, we contend there was no partnership. There was no joint property held by these firms. There was no partnership assets of any kind. It is said the cattle "space" constituted partnership assets, but that consisted merely of contracts with steamships, and each company retained its own "space" and the other had no right in it except on payment of cost price; *Ex parte Tennant*, L. R. 6 Ch. D. 303; *Ross v. Parkyns*, L. R. 20 Eq. 331. As to the money paid into the bank, that never belonged to the other firm. It was simply paid in to a private account. There was no partnership in law, or in fact, and the parties did not intend to be partners. But even assuming that there was in fact a partnership, was this debt incurred in a matter

within the scope of the partner's authority who incurred it? We contend that it was not. The borrowing of money for the purpose of carrying on a business is not one of those things that one partner has any implied authority to do, so as to bind his co-partners, and it is not pretended that there was any express authority. The April document controls that of October. The document of April refers to a prior *verbal* agreement of December 8th, and does not relate to the memorandum of October. If the cattle and sheep became the joint property of the two firms then there might be a partnership, but not till then. Now, they never did become such joint property, and therefore there was no partnership: *Young v. Hunter*, 4 Taunt. 581; *Saville v. Robertson*, 4 T. R. 720. The cattle when bought were not bought on partnership account, having regard to the agreement of April. The agreement of October was never acted on, it is therefore immaterial to discuss its meaning. The correspondence shews that up to March 4th, the plaintiffs understood that R. Craig & Co. were going on by themselves, and that credit was given to them alone. As regards Mallon, it is clear he could not be held liable for what preceded the agreement of April. Then the Thompson company were induced to enter into the agreement of April 20th, by the misstatement of Kennedy. The enquiry made as to the losses of the Craig company indicates that it was made for the purpose of finding a basis for the parties to come together. It is an enquiry preliminary to a partnership, and is entirely inconsistent with the notion that a partnership had already been formed. The previous correspondence is not evidence of a partnership, it merely shows they were expecting to enter into relations.

The question is, to whom was credit given? Clearly not to the defendants Thompson & Co., but only to Craig & Co. The former firm therefore cannot be held liable: *Story on Partnership*, 7th ed., secs. 134, 136. The agency at all events can only begin when the community of profit and loss commences. The course of dealing with

the bank shows that the individual liability of the members of Craig's firm was closely watched. The bank knew all the facts as to the position of Thompson & Co., and elected to take the security of R. Craig & Co. alone. They cannot say that they did not know that the Thompson company were dormant partners: *Smith v. Craven*, 1 Cr. & J. 500; *Re Adanson's Fibre Co.*, L. R. 9 Ch. App. 635. Here the claim is founded on a promissory note for \$50,000, to which the Thompson company are no parties. The Craig company carried on business on their own account, and loans were made by the plaintiffs on the credit of R. Craig & Co. solely, and none of the cattle bought with the money got from the plaintiffs, was to come under the power or control of the Thompson company. This shews that the cattle when bought was not assets of the syndicate at all, or within their control. The plaintiffs had notice that Aikins and Woods had not signed the April agreement before any advances were made. As these two did not sign the other intending partners were not bound, there was in fact no concluded agreement. The signature of all was essential. Those who actually signed must be taken to have done so conditionally on the others signing, from the nature of the case. The instrument of April shows that no rights were to arise under it, until the end of the whole transactions contemplated, and there was to be no coming together at any earlier stage, or for any other purpose. The agreement provides for the pooling of the profits and losses only when the result of the season's operations by the two firms should have been ascertained. This is no partnership. *Barton v. Hanson*, 2 Taunt. 49; *Ex parte Davis*, 4 DeG. J. & S. 523. The instrument was only a covenant to pay one-half the net profits, but if there were a partnership this covenant would be unnecessary. There is no test of partnership except the intention of the parties: *Noakes v. Barlow*, 26 L. T. N. S. 136; *Kilshaw v. Jukes*, 3 B. & S. 847; *Bullen v. Sharp*, L. R. 1 C. P. 86; *Gibson v. Lupton*, 9 Bing. 297; *Wilson v. Whitehead*, 10 M. & W. 503; *Syers v. Syers*, Cas. L. R. 1 App. 174; *Lindley on Partnership*, 4th

ed. p. 20; *Smith v. Watson*, 2 B. & C. 401. Here the parties expressly stipulate that there shall be no partnership between the two firms. Assuming that the instrument of April ever went into operation, it was immediately rescinded by reason of the fraud in the statement of the losses of the Craig company, and it was notified to the bank. The fact of rescission was acquiesced in by the Craig company: *Rawlins v. Wickham*, 3 De.G. & J. 304; *Redgrave v. Hurd*, L. R. 20 Ch. D. 1, 12; *May v. Thompson*, L. R. 20 Ch. D. 705; *Piper v. Simpson*, 6 App. R. 175.

C. Robinson, Q.C., in reply. It is not necessary to have joint property in order to the existence of a partnership, and the time when a joint interest in property begins is not necessarily a test as to when a partnership begins, if from the nature of the partnership the possession of joint property is not necessary for the purpose for which it is formed. It cannot be said that the plaintiffs elected to give up the liability of the Thompson company, knowing that they had any such claim. In order to a valid release there must be a knowledge of the right, and an intention to abandon what is given up. The plaintiffs' attitude was to carry out the course of dealing contemplated at the outset, but there was not any giving up of their rights. Such an arrangement as was made in this case is capable of being carried out, so as to preserve the liability of all, although the business is done by and security taken from one branch of the concern. All the defendants up to a certain point admit that they went in under the agreement of October, but later on they change their attitude, and say that agreement was only a preliminary one. There is no evidence that it was ever communicated to the bank that Mallon repudiated the agreement on the ground of fraud, or misrepresentation. The claim is not on a promissory note, but for money lent. *Carruthers v. Ardagh*, 20 Gr. 579. It is true a note was taken for the debt, but the plaintiffs are entitled to claim original consideration against all the members of the partnership: *Nicholson v. Rickett*, 2 E. & E. 497

Yorkshire Banking Co. v. Beatson, L. R. 5 C. P. D. 109, 120. Both companies' names are common to the syndicate, and a loan to one is a loan to the syndicate: *Cooley v. Board*, 29 La. Ann. 345; *Story* on Agency, 9th ed. p. 45, 46; *Rath v. Moore*, 19 La. Ann. 86.

November 15th, 1882. BOYD, C.—The one question to be determined is, whether all the defendants are liable for advances made to those of them who constitute the firm of R. Craig & Co. The first six of the defendants who constitute the firm of Thompson & Co., resist the claim. Their liability must depend upon whether they contracted to be so liable, whether directly or by implication. No doctrine of estoppel arises in the case, because it is not pretended that they held themselves out as liable, or that they by action, or inaction induced the bank to change its position, on the faith that they were answerable for the loan. Nor is any reference required to the principles of law pertaining to dormant partnerships, inasmuch as the contention and the evidence of the plaintiffs are that they knew the relationships and dealings of all the defendants from the outset. I think it may be broadly stated that the plaintiffs had all the information which the Craig firm had, or could communicate, and if so the case cannot be treated as one of dormant partnership so far as the plaintiffs are concerned. The plaintiffs put their case before the Court on the ground of one partnership uniting all the defendants in the undertaking for the purposes for which the money now sought to be recovered was advanced. It is not argued that the Thompson company directly authorized the advances, but it is said that the partnership relation, if established, confers an implied authority on the Craig firm, who obtained the money, to bind the others. It is said further that this partnership relation is established conclusively by the documents in evidence, and by the proved agreement between the two parties to share profits and losses at the end of the season. This, it is contended, supplies an infallible and inevitable proof of partnership,

which the Court cannot disregard. As members of one concern all are liable ; the Craig firm by direct, and the Thompson firm by implied, contract for money borrowed from the plaintiffs, for the use of the common undertaking.

The evidence is very voluminous and very conflicting, and it will be necessary to review it somewhat in detail in its different aspects. The instrument on which the plaintiffs mainly rely to establish the liability of the defendants is that of October 15th, 1880, under which it is said the parties acted and in pursuance of which they carried on all their subsequent dealings and transactions. This instrument originated at a meeting of persons in the cattle trade held about that time at Montreal. Before this there was a firm known as A. J. Thompson & Co., composed of Flannagan, Aikins, Blong, Frankland, Woods, and Thompson. There was previously no firm of R. Craig & Co., although Craig and his son, W. Craig, had been in the cattle business together, and had been associated with Kennedy in that trade for two years before. Kennedy and McLean had previous dealings. As to Hearn, there is no evidence on this point. At the Montreal meeting were present Thompson, Aikins, Morgan, the two Craigs, Hearn, McLean, Kennedy, but none of the others whose names are in that instrument. It was then arranged that two companies should be formed ; one composed of the following members : Thompson, Aikins, Flannagan, Blong, Frankland, and Morgan ; and the other of R. Craig, Kennedy, Hearn, McLean, Scott, and W. Craig. Of these, Flannagan, Blong, Frankland, and Scott were not present. Those present signed the report of the proceedings, then prepared, and it was afterwards signed by Blong, Frankland, and Flannagan. Scott declined to be a party. On the face of it this instrument is a proposition to form a cattle dealers' syndicate, to commence, *in futuro*, with the opening of navigation at Portland, *i. e.*, about December 8th. The evidence leads me to the conclusion that this was a preliminary meeting, and that a subsequent meeting was arranged for as well as the preparation of an agreement in proper form to carry

out what was contemplated. If, as is argued, a partnership was then formed between the eleven who signed, it is difficult to explain the conduct of the parties, or harmonize what was afterwards done with the resolutions at that first meeting. Looking at Craig's firm, their understanding of their position as well as the plaintiffs' (to whom all information was communicated at every stage of what was going on) is set forth in the general manager's letter of October 20th, in which he speaks of Robert Craig as one of a company who have agreed to purchase cattle on joint account. He refers to the Thompson company as another company of which Craig is not a member, who will do business with the Bank of Montreal. "Craig's company," he says, "consists of persons who have had their account in different banks, but I have told him that we will on the joint names afford them all the facilities they want, which might cover \$100,000 at one time. One of the partners," he says, "will be in England, and deposit the money to be cabled over. Of course it is deposited on our account."

Mr. Ingram (a) in his evidence speaks of this meeting as one contemplating an arrangement which he says was to be consummated at a meeting early in November, as he understood. I find no distinct evidence except in the correspondence of the bank of any such meeting in November. But looking at the correspondence in November it does not indicate any arrangement different from that set forth in the letter of the previous month.

The chief parts of the correspondence are as follows: On November 20th, 1880, Herkimer (b) writes the head office that the two companies, Craig's and Thompson's, are to hold a meeting at Montreal, on Wednesday next [that would be the 24th], at which final arrangements are to be made relative to carrying on the cattle trade that winter and spring. He proceeds thus: "Though there are two companies they are to work independently of each other,

(a) This witness was the assistant manager of the plaintiffs.

(b) Mr. Herkimer was the agent of the defendants at Brampton.

and at the close of the season to share either the profits or losses as the case may be." He gave the constituents of Craig's company as, R. Craig, W. Craig, N. Kennedy, Hearn, and McLean (*i.e.*, five in number), and of Thompson's company, as Thompson, Aikins, Flannagan, Blong, Morgan, and Frankland (six in number). He says the standing of these parties (*i.e.*, Thompson's company) is good, and has been accepted by the Bank of Montreal, and then observes that Craig's company will want about \$100,000 at one time, and says that Craig's company will call upon the manager next Wednesday afternoon.

Next is the general manager's letter to the Brampton office on November 25th, in which he speaks of having seen Craig and some of his colleagues, and directs the opening of an account in the name of R. Craig & Co. Proceeding to details, he says: "The rates for sterling are to be the same as the other syndicate get from the Bank of Montreal, with whom we will co-operate. Mr. Craig can ascertain and advise us from time to time what rates the Bank of Montreal are giving to the other syndicate." In a letter of the same date to R. Craig, the general manager mentions those with whom he had the interview referred to in the other letter thus: "My interview with W. Craig, E. B. Morgan, W. Hearn and yourself, representing Wm. McLean, of Goderich, and N. Kennedy, of Montreal, comprising a syndicate formed for the purpose of dealing in exporting cattle to Great Britain." In that letter the general manager, understanding as he does the whole arrangement, speaks of the Toronto syndicate as one with which the Craig syndicate is to some extent affiliated.

Again reverting to the arrangement contemplated in the October propositions, we find that a deposit of \$5,000 was to be made to the credit of the representative of each company in the bank in which the business was to be done, as a margin against loss. As a fact no such deposit was ever made by the members of the Thompson company. They had before and after this

time as much to their credit in the Bank of Montreal, but it was in their general account, on which they could and did draw at discretion. The members of the Craig company gave mortgages or made deposits of a special fund at the instance of the Merchants' Bank, which was kept in a collateral account, and held by the plaintiffs as security. But even this was not completed till towards the end of March, 1881, and over it the Craig firm had no control. It was also provided by the October memorandum that each member should take any position assigned him by the syndicate, and that no new members should be admitted without the approval of all the members. But not the slightest regard was had to this in all the subsequent dealing of the two companies. The first change was the transfer of Morgan from the Thompson company to the Craig company. This is said to have been done before any business was transacted by the firm (probably between November 20th and 25th). But he did not sign the Craig guarantee to the bank till December 28th. He continued in that firm till January 17th, 1881, when he withdrew. He again rejoins the same firm about the 1st of March, 1881, as appears from Herkimer's letter of March 10th, and it was after this rejoining that he makes the deposit of \$5,000 in two sums as required by the bank. The next change in the Craig firm is the withdrawal of Hearn, which occurred on January 26th, 1881, on which the total amount of loss was adjusted and his share apportioned to him by the plaintiffs. In the Thompson firm the defendant Woods became a member about December 20th.

Neither firm was consulted by the other as to these changes, and the bank dealt with the outgoing partners without reference to the Thompson firm. Yet the bank officers say that they understood the position of affairs between the two companies from the outset, and always considered the Thompson firm liable for the Craig firm's debt to the bank. The dealings of the bank with the Craig firm discredit this view of the case. The bank

opened a line of credit with the Craig firm exclusively on November 25th, before any arrangements, as I think, were consummated between the two bodies of cattle dealers. The general manager's letter of that date is important. He uses the term syndicate as synonymous with firm or partnership. He instructs the Brampton office to open the account, which is to be in the name of R. Craig & Co., and this name was continued down till the close of the dealings. He says : "The rates for sterling are to be the same as the other syndicate (*i.e.*, Thompson's company,) get from the Bank of Montreal, Toronto, *with whom we will co-operate.*" This letter may well be contrasted with that of the same writer of March 28th, in which he apprehends that if Kennedy is allowed to borrow money at Molsons Bank the result may be two banks fighting over the same property. Had a partnership been understood or represented as existing between these two companies the attitude and course of the plaintiffs in view of a possible collision with the Bank of Montreal would, I suspect, have been very different. All the correspondence indicates the most studious solicitude on the part of the plaintiffs to have clearly defined the parties liable in the various transmutations of the firm, and to lay hold of every available piece of security which could be obtained to protect them in what was felt, as the losses kept increasing, to be a very perilous and critical line of business. It cannot be that the bank authorities would have overlooked the large possibilities of security from the members of the Thompson firm had the belief then been entertained as to the liability of the members of that firm for the Craig account. I refer specially to the letters from the head office, dated January 10th, 1881, February 2nd, February 3rd, February 8th, February 17th, March 7th, April 23rd, April 25th, and July 5th.

Regard may now be had to the dealings *inter se* of the two firms. Another meeting as important as the first in its character and more largely attended, was held about December 11th. At this Thompson, Flannagan, Blong,

Frankland, Aikins, Kennedy, Morgan, McLean, Hearn, and both Craigs were present, in fact all members of both companies. There was a chain and secretary appointed. Resolutions were passed, committed to writing, and signed by those present, which are now unfortunately lost. The tenor of what was resolved upon may perhaps be fairly drawn from the draft agreement subsequently prepared in March by Mr. Mulock, and the partially signed agreement of April 29th, 1881. The parties intended that there should be no partnership, and that the one firm should not be answerable for the debts and liabilities of the other. This is borne out by what some of the plaintiffs' own witnesses say. For instance, Wm. Craig says: "They had no authority to pledge our credit, and we had no right to put them in for anything," and Robert Craig: "Each of our firms could get what money we liked and where we liked, and neither pledged the credit of the other. We had no right to pledge their credit nor did we;" and McLean says: "There was but one firm when I signed, and not two companies. There was a different arrangement afterwards so that it was to be worked in two firms, and each to be liable for its own." Whatever was the case as to the outside public, there was no secrecy as to the real character of the association so far as the bank was concerned. The manner of doing business by the two firms was well known to the bank. How they dealt is succinctly given in Kennedy's evidence: "We carried on business quite independently: we bought at what prices suited us, made shipments when we thought proper. As far as purchasing, and shipping, and getting the money, and receiving the proceeds of the shipments, the two businesses were entirely distinct."

The primary, nay the sole, object aimed at in the formation of the so-called syndicate was, to prevent competition in their purchases of cattle and sheep for exportation, and so to control and share the provincial markets between them. It is evident that this could be as well accomplished by an association which was not a

partnership as by the formation of a partnership. All the communications between the parties which indicate some common interest are not necessarily referable therefor to a partnership, but may as easily and naturally be explained on the other theory. The strongest piece of evidence as to any joint dealings is the letter of December 16th. Yet giving this its utmost weight it only relates to vessel space, and cannot imply that there was a joint interest in the purchases of cattle. But this and the one or two other letters relied on are entirely overborne by evidence of an opposite character. It is established that what was mainly in the contemplation of the parties was to secure the monopoly of the spring trade. As I understand the memorandum of October, the only winter vessel space secured was, with the Dominion and Beaver lines from Portland, whereas for the spring trade from the St. Lawrence (beginning in May and lasting till November), there was space in the following lines: Allan, Dominion, Beaver, Temperley, Ross, Great Western, and Donaldson. There is no distinct evidence of how this space was severally shared as between the two companies. As I make it out, of the winter space, Kennedy and Craig had taken the Beaver ships, and Thompson those of the Dominion. Of the others for the spring trade, Kennedy had the Allan and Beaver lines, and Thompson the residue. There was an arrangement to divide space between Thompson and Morgan, entered into when the space was acquired, and long before the syndicate was thought of. There is no evidence of any interchange of space as of right, or any using of it in common as between the two firms, but rather evidence tending in a contrary direction, such as that if one used the space of the other no more than the cost price therefor was to be charged. The documents in evidence also show, as I understand them, that many more shipments were made by the Craig firm during the winter than in the vessels of the Dominion and Beaver lines. If they used the Dominion line it may be explained because of Morgan's past interest therein under the prior agreement between him and Thompson.

Turning now to the correspondence, I find very strong evidence that there was no consummation of the arrangements for a syndicate during or after the winter shipments. On the part of the Craig firm these shipments began about December 8th, 1880 (see letter of Herkimer of about December 1st). Up to January 5th they had two of sheep and seven of cattle. From January 5th to March 8th, of sheep, nine shipments, and of cattle, seven shipments. In March, three shipments of cattle, and two of sheep. Looking at the values and cost of these shipments the result is, that of winter work, up to January 5th, the aggregate was \$100,000, and for the rest of the season to the end of March the aggregate is \$160,000. It thus appears that at the time of the correspondence I next refer to the greater part of the winter's business had yet to be done.

On January 5th, 1881, Hearn and R. Craig unite in a letter to Thompson and Flannagan, the substance of which is: "We have been consulting, and think that the object we had in view is completely defeated, as there seems to be any amount of cattle buyers that have got space, and there will be therefore no object in us going together."

On January 8th Thompson & Co. write to Craig & Co.: "We have Hearn's letter, from which it appears that your company is desirous of dissolving and cancelling the syndicate arrangements *proposed to be carried out* between our companies. We want you to inform us whether you wish to discontinue the *intended* amalgamation of your company with ours or not."

On the same day Flannagan writes to Kennedy, and after referring to Hearn's letter, continues: "As it is the desire of your company not to do any business together this season with us, will you let me have your views on the matter?"

On the January 17th, Kennedy answers: "My friends have acted to me the same as to you. They seem determined to break up the arrangement at all hazards, and have notified me that they will only complete the winter arrangements with me on joint account, and then each one

go on their own account, which I have consented to. It seems to me the parties never had confidence in each other to justify the undertaking of so important a business as that which we had undertaken to do."

On January 28th, 1881, Flannagan laments the prospect of losing the gains that might be made in May and June, and adds: "If those men had stiffened their nerves we would have made any amount of money, and I do not think it is too late yet, if we could arrange to buy cattle here and in Montreal for what they are worth when the time comes."

Confirmation is given to this view by what took place with Mr. Mulock. The spring business being that mainly in contemplation, Aikins and Flannagan see him early in January with copies of the minutes of both meetings in October and December. These are left with him, but he sees nothing more of the parties till March, and when he drafts the proposed agreement then a blank is left for the date of its commencement, though it is specified as ending on June 30th. At the end of January then nothing appears to have been done under the syndicate, though it was still in contemplation, if possible, to secure the spring trade. At this time and during February, when nothing further was done, the Craig firm was reduced to the two Craigs, Kennedy, and McLean. On March 8th, Herkimer writes to the head office a letter which corroborates the view I have taken of the evidence. He says: "Another change has taken place in this firm by the amalgamation of Thompson & Co. and Craig & Co. The two companies deemed it for their interest to work together. Williamson & Co. have bought all the cattle they require. The only others in the exporting trade are Craig & Co. and Thompson & Co., and as they have all the space taken from Canadian ports no other party can ship a single head. The farmers will be compelled to sell to them at moderate rates. This is a step in the right direction, for had they not amalgamated there would be competition in buying. Morgan is again a member of Craig & Co. He will specially deposit \$5,000. This will make \$15,000 to that account

and Craig is to assign two mortgages, one for \$3,500 and other for \$3,400. The Toronto firm, as you are already aware, is composed of Thompson, Flannagan, Blong, Aikins, and Frankland." The answer from the general manager, of March 7th, seems to overlook in the P. S. the information that Morgan has joined the firm again, and while in the body giving directions to open a new account (based evidently on the addition of Morgan to the firm), it does not advert to the firm of Thompson & Co. as if any additional advantage or security were being gained by the bank by the amalgamation announced. The head office does not apprehend that this amalgamation means a partnership, nor is this position taken until long after the last advance and the Craigs are found unable to pay. But the evidence does not bear out the statement of this letter that an amalgamation had taken place at that date. Flannagan's letter of January 28th, shows that the purchases for the spring trade would be made in April; and quite in accord with this is a letter from Thompson & Co. to Kennedy, of March 31st, 1881, to the purport: "The time is drawing near for buying cattle for the opening of navigation for the St. Lawrence next May and June. We wish a general meeting of the members of both companies to settle up the spring business. As there are to be fat cattle fairs at Fergus, &c., we wish the meeting on April 7th. As this meeting is really necessary for completing the arrangements between the two companies for the spring business we wish you to bring with you a full statement of your company's affairs, and we will also provide a statement of our affairs at the meeting."

Previous to this, according to Kennedy's evidence, at the end of February, Thompson, Blong, R. Craig, and Morgan saw him and proposed to carry out the first agreement. He says: "We then agreed, and we were to hold a meeting in Toronto, which was held afterwards." It is referred to in the letter of March 31st, but did not come off till April 20th. "After February meeting," he says again, "we were to meet and perfect the whole arrangement."

Morgan says: "In February or March I understood syndicate was going on again, but what one would say the other would object to."

Mr. Mulock's first agreement was drafted on March 9th as I understood him to say. McLean was ill during January, February, and March. The meeting did not take place on April 7th, because Craig and Morgan came to Thompson and said something was wrong in Kennedy's books, and it would have to be investigated. The Thompson firm wanted to know the liabilities of the other firm because, as Aikins says, "if we were going to pool we wanted to start equal." All the witnesses agree that inquiries and investigations were made as to the position of the two firms with reference to the prior trading during that season beginning in December. This cannot be explained except upon the assumption that they were about to enter into a new relationship, and required to know the standing and losses of each other to decide intelligently upon what the agreement should be. They had it in contemplation to share the losses at the end of the season, and it was intended to go back with the arrangement so as to cover the whole season from December 8th. They were willing to throw in (so to speak) the winter's mishaps, amounting, as was represented, to about \$18,000 of loss on each side, for the sake of forming a combination to control the lucrative trade which the spring promised. The discussion at this meeting in April is almost a demonstration, when coupled with other evidence, that the parties were still in treaty, and that it was open for either one to withdraw. No consistent character can be given to the whole body of indisputable evidence, consisting of correspondence and conduct, unless it be upon the footing that the syndicate, while in contemplation, was never actually formed up to April 20th.

The instrument under seal signed by ten of the twelve individuals concerned on the 20th April cannot be viewed as a document binding those who signed. It purports to be made between the members of Thompson's firm (naming

them) of the first part, and the members of the Craig firm (naming them) of the second part. Only four members of the Thompson firm sign. Till all sign you have not a complete execution by the party of the first part. Besides, the Thompson company were entering into it as a partnership, and till all signed it could not, from the nature of the case, be binding on the partnership as a joint obligation, or on the four individuals of that partnership who signed it: *Latch v. Wedlake*, 11 A. & E. 959. It is in evidence that the bank was informed of the non-execution by Aikins and Woods before they made the advance in May of \$58,000, which is the foundation of the cause of action in this case. There was, in my view, no syndicate formed up to April 20th, and no acting under the provisions of the instrument of that date thereafter, so as to constitute a partnership between all the defendants. That instrument, however, may be looked at to see what the understanding of the partners was, being the superior and controlling document, to use the language of the Judges in *Leggott v Barrett*, 28 W. R. 962. I think the recitals represent the actual state of affairs when it is there said that the Thompson firm had been engaged together in the business of buying cattle and exporting them to Great Britain, and there selling them, and that the Craig firm had been similarly engaged—thus distinguishing between the businesses of the two companies, and negating the inference of one common joint undertaking. And so as to the recitals respecting the cattle space. The evidence shows that the Craig firm during all this time obtained advances from the bank on the sole credit of that firm and its individual members, that they made their purchases without reference to or consultation with the other firm, that the cattle were shipped in their own vessel space, consigned to their own agent, by whom, when sold, the proceeds were paid into banks designated by the plaintiffs and with their privity. So that from beginning to end the Craig firm initiated and controlled the whole course of their business, subject only to the directions of their own bankers.

Assume, however, a completed agreement as set forth in the instrument of April 20th, and that this represents the actual course of dealing between the firms from December 8th, I should not hold that such a relationship was thereby created or manifested as would entitle the plaintiffs to recover. If it would amount to a partnership, then a partnership in what? Not, I think, in the buying of the cattle for exportation; and if not this, then conferring no authority to involve the one firm in the engagements of the other with the bank. If thus viewed, the case would be governed by that line of authorities of which *Barton v. Hanson*, 2 Taunt. 49, is a typical instance, and *Heap v. Dobson*, 15 C. B. N. S. 460, one of the more modern decisions. The fact of the provision being found in the instrument as to sharing the profits and losses cannot over-ride all the other parts of the agreement. True, in an ordinary trading partnership, when you find a community of capital and stock in trade, and a common undertaking, such an agreement to share profit and loss is practically conclusive evidence of partnership—but that conclusion does not necessarily follow when there is an extraordinary adventure between two partnerships presenting a well-defined and a well-known separation of interests and ownerships. See *Story on Partnership*, 7th ed., sec. 130, p. 220, note. This view as to the effect of sharing profits and losses is taken by Blackburn, J., in *Noakes v. Barlow*, 26 L. T. N. S. 139; by Jessel, M. R., in *Alfaro v. De la Torre*, 24 W. R. 510; and by Bramwell, J., in *Bullen v. Sharp*, L. R. 1 C. P. 125, where he puts a case very like the present as I now deal with it. "If A agrees with B to share profits and losses, but not to interfere with the business, and not to buy or sell, and does not interfere, nor buy nor sell, and C, knowing this, deals with B, he would have no claim upon A." The covenant to pay profits and share losses may well be explained by reference to the position of the two firms. They desire to do business independently—to make their own arrangements as to credit and as to sales: and at the same time they desire to

shut out competition, control the markets, and if possible, share the business of the country between them. The consideration they are willing to give is to divide the net profits at the end of the season, or to contribute equally at that time to each other's losses. This would involve a right of set-off of losses as between themselves which would be interfered with if the creditors of either could enforce a partnership upon them against their will. As pointed out by Cotton, L. J., in *Ex parte Tennant*, L. R. 6 Ch. D. 316: "The way in which the profit is to be participated in is really the essence of the whole matter." If this instrument creates *de novo*, as not existing before, a right to call for half the profits then that right exists *qua* debt and not by virtue of a partnership. A similar distinction is made by a distinguished American jurist, who says that, "if the receiver of money did not intend to acquire any interest in or control over the profits as they accrue and before they are ascertained and divided, but only after they were ascertained to find in them the fund of his payment, he is no partner, nor liable as such:" *Parsons on Partnership*, p. 71. Considerations such as these would, in my opinion, nullify the effect of the instrument in question so far as it is relied upon to establish a partnership. The covenant to pay does not give a right to half the profits as such, it is only a personal agreement not importing any ownership of the profits before division. Assuming a partnership, I think the point well taken that the bank, knowing all the facts, elected to give credit to, and deal exclusively with, the firm of Craig & Co., so as now to preclude them from resorting to Thompson & Co. The cases are collected and commented on in *Story on Partnership*, 7th ed., sec. 134 *et al.* to sec. 145. The bank was well aware that one firm had not the right to pledge the credit of the other. This would be a lawful and not unreasonable limitation of the partnership powers, which would bind a creditor having knowledge of it: *Story on Partnership*, 7th ed., sec. 128, and *Collyer's Law of Partnership*, sec. 407.

I have thus considered the case in most of the many

aspects in which it was argued, and my conclusion is, that the plaintiffs have failed to establish any right of action against the members of the Thompson firm, and as to them this action should be dismissed, with costs.

So far as Mallon was concerned he was before April 20th a stranger to the Craig company and its dealings, although through his partner Woods he was a sub-partner in the Thompson firm. He then signed the agreement of that date, intending to join the Craig firm, on the faith of an amalgamation being completed, and relying on the statement made by Kennedy that the prior losses of the Craig firm were the same as those of the Thompson firm, *i. e.*, \$18,000. He was entitled to a fair and accurate statement of the liabilities of the firm he was entering, and apart from any question of intentional fraud the evidence very clearly shows that Kennedy materially misrepresented the financial condition of his partnership. In losses from shipments alone the aggregate was then \$4,000 or \$5,000 more than was represented, while there were other losses which would increase the amount. This of itself is enough to relieve Mallon from his engagement to become a partner : *Charlesworth v. Jennings*, 34 Bea. 96. But he is also, as between himself and his partners, entitled to be relieved, because he was joining on faith of the syndicate arrangements being completed ; but as I have already intimated these fell through, because of the non-signature by two of the members, as well as because of the dissatisfaction of the Thompson firm with the discrepancy between Kennedy's statement of losses and the actual state of affairs.

When the bank is apprised of Mallon's introduction into the concern an agreement is sent for him to sign, by which he is to engage himself with the other members to authorize R. Craig to act as the representative of the firm in dealings with the bank, and to sign and endorse notes, cheques, &c. This is on April 23rd, 1881, and again on April 26th another instrument is sent from the head office for Mallon's signature, defining the line of credit and agreeing to a transfer of the account from the Brampton office to the

head office at Montreal, and arranging for a use of individual names to bind the partnership. These Mallon refuses to sign about the end of April, and before May 2nd, on which day Mr. Herkimer (who was to obtain Mallon's signature) telegraphed to Montreal: "Mallon wanted to consult Thompson & Co. before signing." Mallon says he refused because Aikins and Woods had not signed the agreement of April 20th. The bank knew of their failure to sign, according to Morgan, two or three days after April 20th. According to Mr. Ingraham the bank knew on May 7th or 10th that Mallon repudiated, or rather (as he puts it) wanted time to investigate the books at Montreal. On May 10th Mallon writes to the Brampton office that till he had seen and examined a full statement of the affairs of Craig & Co. he could not take an interest in that company. "I hope," he continues, "to get satisfactory information in a few days, but till then I am not, as you are aware, responsible for their engagements,"—thus referring to what had occurred between him and Herkimer as to signing the documents sent on the 23rd and 26th April from the head office. At this point there is some correspondence from the Brampton office to the general manager not put in. The next letter I find is one from Mr. Hague to the Brampton office of May 11th, in which he writes: "You see the manner in which you have been fooled and trifled with by Mallon. Evidently he has thought better of his intention to go blindly into partnership with these people. But he has accepted the draft and must now pay it. You have my instructions to place it in suit forthwith." And again, on July 5th, after enumerating what the bank can realize upon, he writes: "The Mallon note which you have at Brampton in suit may yield us \$5,000 more, but that is all we have to look to except the members of the syndicate themselves (*i.e.*, as appears from the context, the other five, excluding Mallon).

The plaintiffs' claim is based on a settlement of account had with the Craig firm on May 26th, 1881, when a demand note for \$58,000 was taken, signed by R. Craig & Co., and

the five individuals. I think it is clear that this did not bind Mallon, and that the bank did not suppose that any of that firm had power or authority to bind him. If the bank has any claim against him (apart from the draft of \$5,000) for advances to the firm after April 20th, and before they were aware of his refusal to enter the partnership, it has not been alleged on the record or established in the evidence before me. So that as to him also this action should be dismissed.

As to the *Mallon v. Craig* action, what I have said disposes of that except as to the \$5,000 draft, which he accepted while yet in doubt as to Kennedy's misstatements, and for which he is liable to the bank, but the other five of the Craig firm should indemnify him against its payment. This relief to be without costs, as he charges fraud against the Craig company, which is not, I think, established.

MEMORANDUM.

MR. GEORGE A. BOOMER, Barrister-at-law, was, on December 8th, 1883, appointed a joint reporter of the High Court of Justice.

[CHANCERY DIVISION-]

MAGURN V. MAGURN.

Alimony—Marriage—Foreign divorce—Domicil.

Where, in an action for alimony, it appeared that the defendant had, previously to action brought, obtained a divorce from the plaintiff in M., one of the United States of America, and for that purpose had resided a sufficient period of time in M. to comply with the local law governing divorce, yet that his *bonâ fide* domicil, both at the time of his marriage with the plaintiff, which also took place in the United States, and at the time of the said divorce, was Canadian :

Held, that the divorce did not operate in this Province, so as to bar the plaintiff's claim for alimony.

The marriage relation cannot be properly regarded as one of mere contract, for the rights, duties, and obligations arising from it are not left entirely to be regulated by the agreements of the parties, but are to a certain extent matters of municipal regulation, and as to them the law of the domicil must be looked to.

THIS was an action for alimony by Florilla H. Magurn against Samuel F. Magurn, the plaintiff alleging that the defendant had deserted her and ceased to contribute to her support, and that she was wholly without means of subsistence.

In his defence the defendant set up that, on April 26th, 1877, he commenced and carried on proceedings against the plaintiff in the Circuit Court of St. Louis county, in the state of Missouri, being the proper Court having jurisdiction in that behalf, and to which the plaintiff, as well as the defendant, submitted; and such proceedings were had and taken therein that upon June 19th, 1877, a judgment of the said Court was pronounced dissolving and annulling the said alleged marriage, and restoring the defendant to all the rights and privileges of an unmarried man; and a decree was duly issued in accordance with the said judgment and the practice of the said Court, and remains on record in the said Court; and he claimed the benefit thereof as an effectual bar to the plaintiff's claim and the grounds of action therein taken. He alleged that he then was, and is still, a citizen of the United States of America, and not a subject of Her Majesty the Queen, and that the domicil of himself and that of the

plaintiff was within the jurisdiction of the said Court at the time, before, and during the time of such proceedings being taken: that the said judgment of divorce had continued and was still in full force and unimpeached, and had ever since been acted upon, acquiesced in, and recognized by the plaintiff, as well as by himself, as valid and binding upon them; and in the belief that the same was valid he subsequently intermarried with another woman; that the proceedings to obtain the said judgment were regularly taken upon due notice to the plaintiff, and without anything improper being done to obtain the same: and due cause for such judgment was found by the said Court. And he submitted that the plaintiff was bound and estopped thereby; and that this Court should not be required to investigate the regularity of such proceedings, but that the plaintiff should be left to apply to the said Court in which they were taken for any relief to which she might be advised that she was entitled in respect thereto, he being ready and willing to meet such application; and that, until the said judgment was reversed, he was advised that regard is due thereto by this Court, without question as to the regularity of the proceedings on which the same was founded.

The other facts of the case, and the evidence adduced, sufficiently appear in the judgment.

The hearing of the case was commenced before Boyd, C., at Lindsay, on April 10th, 1883, when, after certain evidence had been taken,

S. H. Blake, Q. C., for the defendant, admitted the plaintiff's right to alimony if the St. Louis divorce could be collaterally questioned in these proceedings.

The argument was then adjourned to Toronto, where, on April 28th and May 2nd, 1883, the case was argued before Boyd, C.

James MacLennan, Q. C. [after reading the correspondence between the husband and wife]. The marriage was a Canadian marriage, the husband's domicile of origin being

Canadian, and no domicile of choice having ever been acquired up to the time of the marriage. The *status* of both parties must therefore be determined by the law of the husband's domicile; and if the husband's domicile was Canadian, this divorce was not good: *Udney v. Udney*, L. R. 1 H. L. (Sc.) 441; *Bell v. Kennedy*, L. R. 1 H. L. (Sc.) 307; *Briggs v. Briggs*, L. R. 5 P. D. 163; *Shaw v. Gould*, L. R. 3 H. L. 55, 5 P. D. 153, 6 P. D. 35; *Shaw v. Attorney-General*, L. R. 2 P. & M. 156; *Harvey v. Farnie*, L. R. 8 H. L. 43. The divorce is void, having been obtained by fraud: *Abouloff v. Oppenheimer*, L. R. 10 Q. B. D. 295; and even apart from fraud, it was not obtained on grounds recognizable here.

C. R. W. Biggar, on the same side. A foreign judgment affecting *status* can be questioned here for fraud, or want of jurisdiction: 2 *Smith's L. C.*, 8th ed., 832-43; *Story's Conflict of Laws*, secs. 597, 608; *Wharton's Conflict of Laws*, 2nd ed., secs. 652-3; *Bigelow on Estoppel*, 3rd ed., pp. 192-5: and that too even when set up by way of defence: *Bandon v. Becher*, 3 Cl. & Fin. 479-510; *Footte's Private Int. Jurisprudence*, p. 469; *Carnell v. Sewell*, 3 H. & N. 617, 646; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Wharton's Conflict of Laws*, 2nd ed., sec. 665; *Monroe v. Douglas*, 4 Sandf. (N. Y.) 34. The authorities as to the conclusiveness of judgments *in personam*, when set up by way of defence under a plea of *res judicata*, do not apply to judgments *in rem*, or touch the right to impeach such a judgment for fraud: 2 *Kent's Comm.* 12th ed., pp. 109-10. This judgment was void for fraud, (1) Because the defendant's domicile at St. Louis was a colourable one, and not a real domicile, and obtained only for the purpose of this divorce: *Browne on Divorce*, 4th ed., pp. 10-13; *Briggs v. Briggs*, L. R. 5 P. D. 16; *Re Tootal's Trusts*, 74 L. T. 430. (2) Because the service of process on the wife was effected by a fraudulent stratagem: *Dunlop v. Cody*, 3 Iowa 260. (3) Because there was fraud in the allegation of desertion made to give jurisdiction, the fact being that it was the husband who deserted the wife, and this renders the judgment void: *Bigelow on*

Fraud, 178. I also cite *Novelli v. Rossi*, 2 B. & Ad. 757; *Dicey* on Domicil, 239; *Herman* on Estoppel, p. 198, sec. 183.

S. H. Blake, Q. C., for the defendant. There was no fraud on the Missouri Court. There was an actual absence of the wife, and an actual ceasing of cohabitation, together with an intention on both sides that it should be permanent. Then there was no fraud on the plaintiff. She was served with the petition for divorce; knew that it would be obtained if she did not oppose it; made no defence, and did not offer to return to her husband. The decree of the Missouri Court is conclusive evidence as to the jurisdiction, the domicile of the husband, and the fact of desertion. This decree cannot be attacked collaterally. It must be attacked, if at all, in the *forum* in which it was granted. The plaintiff is bound by her acquiescence in the decree for six years and her *laches* in not attacking it until now. On the faith of this being a binding decree the defendant has remarried and had children; and the rights of third parties having thus intervened; the plaintiff cannot now seek revenge by attacking this decree collaterally, when her remedy has been lost by the *lex fori*. Domicil at St. Louis was not necessary to give the Court jurisdiction: all the Missouri statute requires is residence; and so long as the defendant's residence there is not shewn to have been expressly for the purpose of obtaining a divorce, it is sufficient. I refer to *Kinnear v. Kinnear*, 45 N. Y. 535, 540; *Singer v. Singer*, 41 Barbour (N. Y.) 139; *De Graw v. De Graw*, 7 Mo. App. 121; *Nicholls v. Nicholls*, 25 New Jersey Eq. 60; *Yorston v. Yorston*, 32 New Jersey Eq. 495; *Monroe v. Douglas*, 3 Sandford (N. Y.) 136; *Harvie v. Farnie*, L. R. 5 P. D. 14, 6 P. D. 49, 8 App. Cas. 43; *Niboyet v. Niboyet*, L. R. 4 P. D. 1.

Charles Millar, on the same side, referred to *Pigott* on Foreign Judgments, ch. 2 (on Status), shewing that residence without actual domicile is sufficient to give jurisdiction to decree a divorce; and *Bennett v. Bennett*, 43 Conn. 313, shewing that refusal to cohabit is equivalent to desertion.

James MacLennan, Q. C., in reply. This suit is merely for alimony, and we did not want relief until the defendant ceased to supply alimony. There has been no delay. The defendant was a Canadian from the first, and had no intention of abandoning his domicile of origin. I refer to *Ochsenbein v. Papelier*, L. R. 8 Ch. 695; *Shaw v. Attorney-General*, L. R. 2 P. & M. 156; *Price v. Dewhurst*, 8 Sim. 279; *Bank of Australasia v. Nias*, 16 Q. B. 717; and on the question of domicile, *Niboyet v. Niboyet*, L. R. 4 P. D. 1, which is explained by Cotton L. J., in *Harvie v. Farnie*, L. R. 6 P. D. at p. 50.

June 6th, 1883. BOYD, C.—The main facts requiring consideration in this case are not open to much controversy. It is established that the husband was born at Kingston, on April 1st, 1845: that his parents were permanently resident there, his father being in the Canadian Civil Service. He went to the United States while still a minor in 1862, with a view to make his way in the world. He moved from place to place in the States without any settled abode, till the latter part of 1868, when, as he says, he took up his residence at St. Louis, with the intention of making it his home. There he carried on business, lodging in different houses till April, 1870. He then formed a partnership, and before his marriage began to travel from place to place in the prosecution of that business. It used to take from two to three years to go the round of his circuit—he would return to St. Louis at intervals, once in 1872 and again in 1873, but had no immediate connection with it or residence there till 1875, though, as he says, he looked upon it as his head-quarters. The marriage took place at Detroit, in October, 1870. He had no home to take his wife to, and she joined him in his travels for the whole of the first year after marriage, and a part of the second. The remaining part of the second year the wife was at Kingston, where the husband's father was living. The third year of marriage she again travelled with him, and towards the close of that year (1873) they

rented a house at Kingston; and that was their home till May, 1875. The eldest child of the marriage was born in the husband's father's house at Kingston; the second was born in the rented house at the same place in November, 1873. The husband says that in May, 1875, he returned to resume his permanent residence in St. Louis. He rented a house there on June 12th, 1875, which, to use his own words, was to give his wife a "permanent home." The lease was for a short time which expired on April 10th, 1876, and he then took his wife to St. Joseph, in Missouri, on April 14th, where he stayed with her till the 20th of the same month, and then left her there in lodgings and returned to St. Louis. His petition for divorce on the ground of his wife's desertion was filed on April 26th, 1877, in which it was charged as the ground of the suit that his wife had absented herself without reasonable cause for the space of one year next before April 20th 1877. The decree of divorce was obtained by default (after personal service on the wife) on June 19th., This result was communicated to the wife by a letter from the husband written on the June 26th, 1877, in which he says: "I have closed the office at St. Louis." He was again married in September, 1877, and went to England a year afterwards, a country to which, as he says himself, he had intended to go for years. He engaged in business in England till September, 1881, when he removed with his family to Toronto after having written to his first wife in May, 1881, that "Canada was his home."

Having outlined the dates and transitions of this migratory life, I may say that I am not disposed to value his present declarations of what his intentions were in going to St. Louis either in 1868 or 1875. The evidence falls far short of establishing what is usually required in order to manifest a change of domicile, and I discard that part of his testimony which says that he rented the house at St. Louis in order to give his wife a permanent home. Previous to that time he had been contemplating a separation from her, and had been, as he says, studying the

subject of divorce. He had been taking legal advice in Indiana, and found that it required three years of actual domicile there to give jurisdiction, and in the very month in which he rented the house he admits that he had come to the conclusion that it was useless for them to go on any longer living together. I find that his residence at St. Louis was in order to comply with the law of the State of Missouri, by which it is necessary that the party plaintiff should reside in the state at least one year prior to bringing the suit. This he observed, and by that law he was, it may be, legally divorced from his wife in a manner and by a decree which is now incontrovertible in that State.

But what I have to deal with is, does that divorce operate in this Province so as to bar the plaintiff's claim for alimony? It is conceded that she is entitled to alimony if not excluded by the decree of divorce. I have to determine this question by the law of England as made applicable to this Province by the Chancery Act.

The ground upon which the decree of divorce was obtained by the husband from the Circuit Court, in the State of Missouri, was, that the wife had absented herself without reasonable cause from a year next before the 20th April, 1877. That is to say, he complains of desertion as the only ground for the dissolution of the marriage. That is not recognized here as a sufficient ground. Apart from this, the evidence clearly satisfies me that there was no desertion on the part of the wife. The separation which gives colour to the complaint was suggested and directed by the husband. He, for ulterior purposes, planned the scheme of the wife's residence apart from him, and thereby practically deserted her. It was only by a suppression and a subversion of the facts that he was able to procure a judgment against her as the offending party. The desire to separate emanated from him, and all the subsequent proceedings were initiated and conducted by him with a view to cut himself loose from a partner with whom he became suddenly, and so far as I can see unreasonably, dissatisfied. But I need not further pursue the ethical

aspect of the case. I have only gone thus far to indicate that the judgment of divorce does not commend itself to me as one that should be upheld on the merits. Can it be upheld, apart from merits, as a judgment *in rem* dissolving the marital relationship, and valid all the world over, because pronounced by a Court of competent jurisdiction?

The validity of the judgment was upheld for the defendant, on the ground that marriage is a matter of contract: that the residence of the parties at the time of the marriage was in the United States: that the marriage was solemnized there, and that the offence for which the divorce was granted was committed in the United States, and that the residence of both parties was there at the time the action for dissolution was begun, and at the date of the judgment therein; and that the judgment thus obtained is now by effluxion of time, and the change of condition on the part of the divorced husband, absolutely valid and binding in the United States, and must be so here also; otherwise the anomaly and the absurdity arises that a marriage dissolved in one country is recognized as existing in another. Granted the premises, the conclusion would, perhaps, incontestably follow. But the primary question disputed by the plaintiff's counsel, is, that marriage is not a matter of mere contract: it is that and something more.

The language of a illustrious Scottish Judge (Lord Robertson), which is adopted by Mr. Justice Story (Conf. L. sec. 109) places this consensual engagement in its true aspect. He says: "The contract of marriage is the most important of all human transactions. It is the very basis of the whole fabric of civilized society. The *status* of marriage is *juris gentium*, and the foundation of it, like that of all other contracts, rests on the consent of the parties. But it differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of the parties, but are to a certain extent matters of municipal regulation, over which the parties have no control by any declaration of

their will." And further he puts the matter thus: "As to the constitution of the marriage, as it is merely a personal, consensual contract, it must be valid everywhere if celebrated according to the *lex loci*; but with regard to the rights, duties, and obligations thence arising, the law of, the domicile must be looked to. * * Yet many of the rights, duties, and obligations arising from it are so important to the best interests of morality and good government that the parties have no control over them, but they are regulated and enforced by the public law, which is imperative on all who are domiciled within its jurisdiction, and which cannot be controlled or affected by the circumstances that the marriage was celebrated in a country where the law is different," (sec. 112). Or as more briefly put by Phillimore, J., in *LeSueur v. LeSueur*, L. R. 1 P. D. 147. "The contract of marriage is often and truly said to be one *juris gentium*, inasmuch as it is a contract, not only concerning private rights but deeply affecting public order. It is a question both of status and of contract."

Viewed in this double aspect, the law of the country where the marriage is celebrated ascertains its validity; the law of the country of the domicile regulates its civil consequences: (*per* Lord Cottenham in *Munroe v. Munroe*, 7 Cl. & Fin. 872). It is one of the rules of universal jurisprudence that questions of personal status depend on the law of the actual domicile: (*per* Lord Westbury in *Shaw v. Gould*, L. R. 3 H. L. 83). The legal consequence of marriage as it affects the wife is, that she is invested with the domicile of her husband.

The marriage of a domiciled Canadian living in the United States with an American woman imposes upon her the status of a Canadian wife with all the rights and privileges incident thereto. All questions as to the permanence and dissolubility of such a marriage depend upon Canadian law so long as the domicile continues to be Canadian: *Harvey v. Farnie*, L. R. 8 App. Cas. 43; *Warrender v. Warrender*, 2 Cl. & Fin. 534, 541; *Munroe v. Munroe*, 7 *ib.* 875; *Foot's Priv. Int. Jurisp.*, p. 263; *Dicey's Law of Domicil* p.

234; *Wharton's Conflict of Laws*, 2nd ed. s. 221, 223. It thus appears that the two important points to be ascertained for the disposal of this litigation are—first, what was the domicile of the husband at the time of the marriage—and second, what was his domicile at the date of the divorce?

His domicile of origin was unquestionably Canadian. Was this ever changed? My conclusion is, it was not. Again quoting from Lord Cottenham's language, in *Munroe v. Munroe*, *supra*: "The domicile of origin must prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile and acquiring another as his sole domicile," 7 Cl. & Fin. at p. 876. As tersely stated by Sir George Jessel in *King v. Foxwell*, 24 W.R. 627: "The acquisition of a new domicile involves two facts—residence in a new country and intention permanently to reside there—both of these facts being compound facts." Starting with a Canadian domicile of origin the *onus* is on the defendant to shew with reasonable clearness that he has made a new home for himself in lieu of the home of his birth. This is putting it perhaps more favourably for the defendant than is consistent with the authorities. During his wanderings and unsettled life in the States the original domicile of the defendant continued, unless he proves that he settled in that foreign country with the intention of abandoning that domicile.

Lord Cranworth says, in *Whicker v. Hume*, 7 H. L. Cas. 159, "It is not inexpedient on questions of this sort, to say that I think that all Courts ought to look with the greatest suspicion and jealousy at any of these questions as to change of domicile into a foreign country. * * Circumstances may be so strong as to lead irresistibly to the inference that a person does mean *quatenus in illo exuere patriam*. But that is not a presumption at which we ought easily to arrive." This language he repeats and emphasizes in *Moorhouse v. Lord*, 10 H. L. Cas. 283; and with the entire concurrence therein of Lord Chelmsford, (p. 287.)

Lord Westbury, in *Bell v. Kennedy*, L. R. 1 Sc. App. 321, says, unless the acquisition of a new domicile be shewn "with perfect clearness and satisfaction, it follows that the domicile of origin continues." The enquiry is as put by Lord Cairns in that case, had the plaintiff finally "made up his mind, or formed a fixed intention to settle" in one of the United States? It needs the *de facto* removal to a home in the new country with an *animus non revertendi*, and an *animus manendi*, as expressed in *Foote's Treatise on Priv. Int. Jurisp.* p. 26.

The evidence in this case entirely fails to disclose one of the essential requisites of a change of domicile. There is no satisfactory evidence that the defendant went to live in the States, or took up his abode there at any point of time with a settled or fixed intention of adopting that country as his home. There is no evidence of his having any fixed home there when he married, or of his having acquired any such permanent place of abode there before his marriage. On the contrary, his intention was rather to reside there temporarily, with a view afterwards to go to England, and ultimately to settle down permanently in Canada as his home. The residence for a year before the divorce suit I regard as merely an expedient to found jurisdiction in the local Court, and falling far short of an acquisition of domicile.

It was argued that this was a sufficient residence however to justify the annulment of the marriage. That may be so as regards the particular State, or the United States but it has no such effect as regards the rights of the wife in Ontario.

In *Manning v. Manning*, L. R. 2 P. D. 223, the husband applied in England for a judicial separation. He was of Irish origin, but alleged that he had for about a year been resident in England, had established himself in business there and taken a lease of a shop for twenty-two years, and had no intention whatever of returning to reside in Ireland. It was urged that this residence was sufficient to found jurisdiction on the ground of his wife's desertion

in Ireland. But Lord Penzance held that there was no *bonâ fide* residence, and declined to assume jurisdiction. He then intimated his dissent from the view that there should be two sorts of domicile, one sufficient for matrimonial purposes, and the other required for purpose of succession, and held, that a *bonâ fide* residence alone can in any sense be called a domicile; and observed that when the Courts of England have had to consider how far persons who are domiciled Englishmen shall be bound by the decree of a foreign matrimonial Court, the strong tendency has been, to repudiate the power of the foreign Court under such circumstances (*i. e.* of residence alone) to dissolve an English marriage.

In *Pitt v. Pitt*, 4 Macq. 627, (1864) it was conceded by (Sir Robert Phillimore and Sir Hugh Cairns), of counsel for the respondents, who, as the reporter notes (p. 648), "were not likely to give up any contention that would have benefited their client," that divorce *a vinculo* to be effectual must emanate from the Court of the real domicile. That is such an absolute and complete domicile as regulates succession. The Lords of the Inner Division had in that case upheld the proposition, which is relied on by the defendant in this litigation, that the husband by residence in Scotland had established a consistorial domicile sufficient for the disposal of matrimonial actions, and that such a domicile was constituted by his having occupied under lease a settled place of residence in that country which was of such a character as truly to make him have his home in Scotland and nowhere else, and had been so resident for two years before his suit was begun. The benefit of this decision, I say, was deliberately abandoned on the appeal to the House of Lords; and it could only be because it was not deemed tenable. And such is the opinion of Lord Westbury as expressed at p. 636, when he speaks of it as a concession quite in accordance with the law of the case. To the same effect is the decision of Williams, J., Martin, B., and Cresswell, J. O., in *Tollemache v. Tollemache*, 1 Sw. & Tr. 557.

There seems but little doubt that the concession in *Pitt*

v. *Pitt*, *supra*, was made on account of what was decided in *Dolphin v. Robins*, 7 H. L. Cas. 390 (1859) (in which Sir Hugh Cairns was of counsel) namely: that Scottish Courts have no power to dissolve an English marriage, where the parties are not really domiciled in Scotland, but have only gone there for such a time as according to the doctrine of the Scotch Courts gives them jurisdiction in the matter. In that case also Lord Cranworth explains (p. 414), the expression that is found in the cases of "*bonâ fide* domicil," this is, a real domicil and not a domicil assumed merely for the purpose of giving jurisdiction. So in *Shaw v. Gould*, L. R. 3 H. L. 55 (1868), Lord Cranworth adheres to and repeats the same principle, that to change the matrimonial *status* of an English marriage by a foreign tribunal, it is requisite at the least that the domicil in that country, to produce that result, must be a *bonâ fide* domicil for all purposes acquired after the abandonment of the English domicil (p. 98.)

The whole question of domicil as affecting divorce was very carefully and elaborately reviewed in 1874, in the Irish Court for Matrimonial Causes, and the Court there arrives at the conclusion that if domicil has two meanings, one in connection with the law of succession, and the other in connection with personal jurisdiction, it would be more easy for one to change his status so as to affect the devolution of his property, than so as to oust the municipal jurisdiction founded upon the domicil of origin as regards his matrimonial rights and duties: *Gillis v. Gillis*, Ir. L. R. 8 Eq. 597; citing *Deck v. Deck*, 2 Sw. & Tr. 90.

The relations consequent upon this marriage could not in this country be altered for the causes complained of by the husband.

I adopt, as not inapplicable to this case, the language of Lord Westbury, in *Shaw v. Gould*, L. R. 3 H. L. 82: "No nation can be required to admit that its domiciled subjects may lawfully resort to another country for the purpose of evading the laws under which they live. When

they return to the country of their domicil, bringing back with them a foreign judgment so obtained, the tribunals of the domicil are entitled, and even bound to reject such judgment, as having no extra-territorial force or validity. They are entitled to reject it as pronounced by a tribunal not having competent jurisdiction, and they are bound to reject it if it be an invasion of their own laws and polity."

My conclusion is, that the plaintiff is not affected in this country by the divorce, and that she is entitled to judgment in her favour, with costs. The amount will be forty dollars per month, as paid by the husband at an earlier stage of the difficulties between the parties, unless a reference is desired by either party, in which case the Master will fix the amount. (*a*)

(*a*) On reference by the defendant to the Master, the amount was fixed by him at \$40 per month.

This case has been carried to Appeal.

[CHANCERY DIVISION.]

THE CORPORATION OF THE COUNTY OF YORK V. THE
TORONTO GRAVEL ROAD AND CONCRETE CO.

*Agreement — Construction — Implied qualification — “Traction engine” —
“Without prejudice.”*

When a road company, empowered by statute to run a traction engine over the highways of a certain county, entered into an agreement with the corporation of the county, whereby, after reciting the said statute, it was agreed that the company should be at liberty to lay down a tramway along a certain road, that tolls to be collected should not exceed seven cents, for cars drawn by one horse, and ten cents for cars drawn by two horses; that the company, if required, should run two passenger cars daily each way, or in lieu thereof an omnibus or sleigh, that in case horses, carriages, teams, or other vehicles or animals met the horses, waggons, carriages, or other vehicles of the company, the latter should have the right of way, and that “so soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use of the said traction engine, and of any other traction engine upon or along such public highways;” and the company insisted on their right, under this agreement to run a steam motor upon their said tramway.

Held that, though the words “traction engine” must be understood in their ordinary sense, as an engine running on the roadway itself, and not on a tramway, yet the above stipulations themselves were such that a qualification must be implied in the agreement excluding the use of steam as a motive power altogether, and indicated that horses were the kind of power, the use of which was completed by the parties to the agreement to be used in the traction of the cars.

Held, also, that the fact that the company for several years after the said agreement used horse power only, was not to be overlooked as evidencing the true agreement of the parties.

Overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly, made “without prejudice,” are inadmissible in evidence on grounds of public policy, although the pendency of such negotiations as a matter of fact may be looked at.

THIS was a suit brought by the corporation of the County of York against the Toronto Gravel Road and Concrete Company (Limited), wherein the plaintiffs claimed that the defendants might be ordered to perform a certain agreement of August 10th, 1874, made between themselves and the plaintiffs, according to its terms and the true intent of the parties thereto, and might be restrained from using any steam engines of any kind on a certain tramway of the defendants, or from working the said tramway in any manner different from that provided

for by the parties to the said agreement at the time of the execution thereof; and that if necessary the terms of the said agreement might be rectified by the Court, so as to express the true intent of the parties thereto, and that the defendants might pay the costs of suit.

The bill of complaint set out that by 37 Vic. c. 90 (O.) the defendants were authorized to construct the tramway in question from the Township of Scarborough to some point in Toronto, and the councils of the municipalities through which the tramway might be laid out were authorized to permit the defendants to construct the same in, along, over, and upon the highway and street upon such terms and conditions as might be agreed upon between them: and that the plaintiffs were seized in fee of the highway called the Kingston Road. The plaintiffs then referred to the agreement of August 10th, 1874, the material provisions of which are given below, and alleged that at the time of the execution of the said agreement it was well understood and agreed that after the ratification thereof the defendants should desist from the employment of any steam engine upon the public highways of the said county: that, nevertheless, the defendants pretended they were entitled to use steam engines on their said tramway, and threatened to do so: that this would be a violation of the said agreement: that a steam engine or motor was a traction engine, but if not, then the last clause of the said agreement relating thereto did not embody the true agreement, and the said agreement should be accordingly rectified so as to contain the true agreement, and provide that the defendants were not to use any engine on the said highway and tramway: that the use of steam engines on the said tramway was dangerous, and the plaintiffs were apprehensive that they would be made liable for damages to persons injured thereby, and would not have permitted the said tramway to be constructed if any steam engines whatever were to be employed thereon.

In their answer the defendants alleged that the agreement of August 10th, 1874, contained the whole bargain and

understanding between themselves and the plaintiffs : that under the provisions of the said agreement, and of their several acts of incorporation, viz., 36 Vict. ch. 114 (O.) : and 37 Vict. ch. 90 (O.), they had a right to operate or work the said tramway by steam power, subject only to certain restrictions as to the rate of speed : that under section 3 of the last mentioned Act they had the right to carry the tramway over the Kingston road subject to the terms of the said agreement, and to use a steam motor or engine on the said tramway : that the engine objected to was not a traction engine, but an engine specially designed for use on streets and highways, and of the pattern known as street motors : that as they, the defendants, were by law authorized to operate the tramway by steam power, no such responsibility for damages was cast on the plaintiffs as by them alleged : that the plaintiffs had made out no case for rectification or reformation of the said agreement, and were in any event precluded by *laches*.

The portions of the agreement of August 10th, 1874, which it is material to notice, were as follows :

This agreement, made the 10th day of August, A. D. 1874, between the corporation of the County of York (hereinafter called the corporation), of the first part, and the Toronto Gravel Road and Concrete Company (limited,) hereinafter called the company, of the second part.

Whereas the company are the owners of a certain traction engine which, under the authority of an Act of the Parliament of Ontario, has been employed by the said company for the conveyance of freight, &c., over the public highways of the said county ; and whereas by a certain other Act of Parliament of Ontario the said company were, amongst other things, authorized upon certain terms and conditions to construct tramways for the conveyance of freight and passengers upon or along the public highways of the said county of York, * * * and whereas the said company have applied to the said corporation for leave to lay down and construct a tramway upon or along the Kingston road, * * * and whereas the

said corporation have agreed, upon the terms and conditions hereinafter mentioned, to give their consent to such application. Now, it is hereby agreed as follows :

1. The said company shall be at liberty forthwith to lay down and construct a tramway, in accordance with the last mentioned Act of the Parliament of Ontario, for the carriage of freight and passengers upon and along the Kingston road, from the gravel beds or pits of the said company in the townships of York and Scarboro' to the City of Toronto.

2. The said tramway shall be laid down on the south side of the Kingston road, the north rail to not exceed ten feet from the present ditch, and shall be constructed so as to interfere as little as possible with the ordinary traffic of the said highway. * *

4. Tolls to be collected shall not exceed the same as for ordinary conveyances, viz.: not more than seven cents for cars drawn by one horse, and ten cents for cars drawn by two horses.

5. The said company shall, if required, run not less than two passenger cars daily each way (or in lieu thereof an omnibus or sleigh), from the Don bridge to Norway, at such hours as may be found most convenient for the company and the public, so long as the said tramway is in use.

6. In case of horses, carriages, teams, or other vehicles, or animals meeting or being overtaken by the horses, waggons, carriages, or other vehicles of the said company travelling upon the said tramway, the said company shall have the first and immediate right of way over and upon said tramway.

7. The company shall have every other reasonable facility afforded them for conducting their business and conveying their traffic over the said tramway, according to the *bonâ fide* intention of this agreement.

9. So soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use and

employment of the said traction engine, and of any other traction engine upon or along such public highways.

WM. CANE, *Warden*. (Seal.)

GEO. EAKIN, *Clerk*. (Seal.)

JOHN FISKEN, *Vice-President*. (Seal.)

J. LAMOND SMITH, *Managing Director*. (Seal.)

Signed, sealed, and delivered }
in presence of } DAVID SINCLAIR.

The rest of the facts of the case sufficiently appear from the judgment.

The case was heard at Toronto on Nov. 10th and 17th, 1882, before Proudfoot, J.

J. K. Kerr, Q. C., and *W. Cassels*, for the plaintiffs. The contract, if properly construed, is as the plaintiffs assert, or if not it ought to be reformed. *McConnell v. Murphy*, L. R. 5 P. C. 203, shews the rule for construing a contract like this. A steam motor is a traction engine. Could a road locomotive different from a traction engine in its most restricted meaning be used in the face of this agreement? If the agreement by mistake does not express what was meant, then it is a case for rectification: *Macdonald v. Worthington*, 7 App. 531. The tolls levied shew what was meant. There has been no *laches*. If steam motors were to be used, it would practically amount to a donation of the road to the company. The parties could not have intended this, and the evidence shews the plaintiffs' intention was to get steam off the road.

C. Robinson, Q. C., *B. B. Oster*, Q. C., and *H. Gamble*, for the defendants. We refer to 37 Vic. c. 90 (O.); R. S. O. c. 174, ss. 509, and 561; *ib.* c. 186, ss. 1, 9, 10. As to the meaning of "traction engine" see R. S. O. c. 186, and *Maxwell* on Statutes, p. 50, *seq.* This is no case for reformation. There has been *laches*, and there was no common mistake. The act of 1881, 44 Vic. ch. 57, O., is of no effect in this cause. Contracts must be construed with reference to all the circumstances of the parties. The defendants never intended to give up the right to use steam. We also refer

to *Campbell v. Edwards*, 24 Gr. 152; *Macdonald v. Longbottom*, 1 El. & El. 977; *Taylor on Evidence*, 7th ed. 997, 1001 *ib.* 6th ed. s. 1082; and as to our right to refer to the negotiations which took place though "without prejudice," we cite *Grand Trunk R. W. Co. v. Clark*, 29 U C. R. 136.

J. K. Kerr, Q. C., in reply, referred to *Drummond v. Attorney-General*, 2 H. L. C. 837; *Chaplin v. Provincial Ins. Co.*, 23 C. P. 278; *Johnston v. Wilson*, 28 C. P. 432; *Shaw v. Wilson*, 9 Cl. & F. 356; *McConnell v. Murphy*, L. R. 5 P. C. 203; *Northern Central R. W. Co. v. The Mayor and City Council of Baltimore*, 21 Md. 101; *Kerr on Fraud and Mistake*, Am. Ed. p. 60.

November 20th, 1882. PROUDFOOT, J.—I think I must hold that the traction engines for the removal of which the plaintiffs were contracting should be understood to mean traction engines, the use of which was authorized by the Statute of 1868 (*a*). The statute is recited in the agreement of 1874, and that the engine used by the defendants was employed under it, and then the plaintiffs stipulate for the removal of it or any other traction engine. And there seems but little doubt that in ordinary and unscientific language, if not in technical phraseology also, a traction engine, without further description, is understood to be one for running on ordinary roads and with a peculiar gearing increasing their traction power at the expense of their speed.

The Act of 1873 (*b*) incorporating the defendants gave no compulsory powers, and they were empowered to make their roads or acquire them by purchase. The amending Act of 1874 (*c*) first gave the defendants compulsory powers, and the power to use steam, and I think it authorized them to use it generally, without any limitation confining it to the traffic referred to in the second section. But they could only construct their tramways upon highways with

the permission of the councils of municipalities, who were authorized to give them permission upon such terms and conditions as might be agreed upon. I do not think that the terms and conditions were to refer only to the construction of the road, but also to the mode of working; and the defendants so viewed it also, as appears by their accepting the permission with such conditions.

Under this statute the defendants applied to the plaintiffs for permission to make a tramway upon the highway; the traction engine having been found to be an intolerable nuisance, as many of the witnesses state, and the plaintiffs making application for legislation on the subject, and the defendants being themselves desirous to change the traction engine for a tramway. The discussions in the municipal council on this matter have been proved by a number of the councillors, and I have no doubt that their intention was, to effect the removal of steam from the highway, as it had been found so inconvenient and dangerous to farmers and others travelling the road.

I do not think it necessary to refer further to the evidence on this subject, nor to enquire whether *upon that evidence* I ought to conclude that the defendants understood they were only getting a qualified permission; for I think that the agreement of August 10th, 1874, itself contains stipulations that are only consistent with the view taken by the municipal council; and that if there is no express, there is, at any rate, an implied qualification, excluding the use of steam as a motive power. I do not rely on the application being for a *tramway*, for the statute authorized the use of steam on such a way; nor upon the provision that it was to be constructed so as to interfere as little as possible with the ordinary traffic, for that only applied to the construction, not to the working of the road, and would be equally applicable whether steam or other power was used. But the provision for the collection of tolls, and that they should not exceed the same as for ordinary conveyances, viz., not more than .07 for cars drawn by one horse and .10 for cars drawn by two horses, seems to me

to indicate very plainly the kind of power to be used in the traction of the cars—horses. An inference of a like kind may be drawn from the clause that the Company, if required should run two passenger cars daily each way, or in lieu thereof an omnibus or sleigh. These latter are vehicles drawn by horses, and would lead us to suppose that the cars were to be drawn in the same manner. The provision for teams meeting is still more conclusive that the cars would be drawn by horses, as it says that in case of horses, carriages, teams, or other vehicles or animals being overtaken by the horses, waggons, carriages, or other vehicles of the Company travelling upon the tramway, the Company should have the right of way. Here the description of the meeting conveyances is identical, and clearly point to horse power as the motive power.

I understood Mr. Robinson to concede that at the time of the agreement both parties only thought of horse power, but that steam not being expressly excluded, the statutory right was not interfered with. But if horse power alone was in the contemplation of the parties, then the Company have not shown that they got a permission to use steam. Or if that was not incumbent on them to show when they got the right to make a tramway, it establishes, however, that the municipality only gave a permission for a tramway to be worked by horse power.

The petition to the Council for the tramway I must consider as having been presented on behalf of the Company. The letter of June 4th, 1874 (*d*), from Smith, one of the Direct-

(*d*) This letter was as follows :
Geo. D. Morse, Esq., Toronto.

JUNE 4th, 1874.

DEAR SIR,—I am quite prepared to admit that there is much force in what you say respecting the injury that may accrue to the value of your property and that of others in consequence of the running of the traction engine on the Kingston road. You are aware that all my arrangements are now completed to commence the season's work, yet at the same time to show you that I do not desire to prove an obstructionist, but am perfectly sincere in saying that I wish to promote rather than injure your interests, I will agree to the proposition you are so earnest in desiring to see carried out.

I beg, therefore, that in future you will attach no blame to me if your

ors, to Morse, authorizes practically an application to the Council, and states the terms to which the Company were willing to accede. Morse at this time was not merely the owner of property injuriously affected by the traction engine, but was also a shareholder to a considerable extent in the Company. The petition represented that the owners of the engine would withdraw it on condition that the Company obtained leave to lay a tramway or street railway on the highway in such a manner as not to impede public traffic. In the discussions on the petition in the Council the nature of the tramway was spoken of as similar to that on King-st. and Yonge-st. in Toronto—both are roads worked by horse power—and forms of rails to be used were shown to the council, which all the officers and shareholders of the defendants who were examined deny to have been presented by them, yet I cannot doubt, from the numerous and reliable witnesses on the part of the plaintiffs, that they were presented by, or on behalf of, the defendants. These rails were of a kind to permit the use of the rails of the tramway by ordinary waggons, such as are

negotiations fail. Your proposition, as I understand it, amounts to this, viz., Our company, on the one hand, to withdraw the traction engine entirely from the Kingston road and all other roads belonging to the county, and not to put this or any other traction engine on them again. The county, on the other hand, to give our company the right to make a tramway or street railway on the side of the Kingston road, in such manner as not to interfere with present traffic, each tramway to be built entirely at our company's expense. Any proposition on your part to be made without prejudice to any existing rights of our company, and this agreement to remain binding on me for a fortnight from this date, but no longer.

I may add for your own information that the county have full power to enter into such an arrangement with our company, either by resolution or otherwise, as our charter specially provides that "The councils of the municipalities, through or in which the said tramways or roads may be laid out, constructed, or pass, may by by-law or otherwise permit the said company to construct the same, or some, or any part thereof, in, along, over, and upon the highways and streets upon such terms and conditions as may be agreed upon between them."

Yours very truly,

J. LAMOND SMITH.

now in use on Yonge and King streets, and quite different from those recently laid by the defendants.

And it cannot be overlooked that for a period of years the defendants acted upon the agreement in the sense ascribed to it by the plaintiffs, by using horse power only, and this at a time when the operations of the company were carried on at a loss, and when, if any such right as now claimed existed, it would probably have been asserted.

I have no hesitation, therefore, in coming to the conclusion that the true interpretation of the agreement of August 19th, 1874, under the circumstances in which it was made, excluded the use of steam power on the tramway, and that it does not need to be reformed to carry the intention of the parties into effect.

But it is objected that the *laches* of the plaintiffs is such as to disentitle them to relief. In the end of 1878 a decree had been obtained by the plaintiffs against the defendants that required a relaying of at least a portion of the road at an expense of about \$1,000, and the Judge who made the decree suggested that the parties should endeavour to come to some arrangements about it. Negotiations for that purpose were entered into; the plaintiffs were pressing for a performance of the decree when, on October 9th, 1879, the defendants notified the plaintiffs of their intention to operate the road with steam motors. These negotiations ended on April 10th, 1880, and the rails so far as I can judge were not ordered till May, 1880, by which time it was known that the plaintiffs would resist the use of steam motors or steam in any manner as a motive power on the road, so that there was no lying by to the prejudice of the defendants. I have not mentioned the nature of the negotiations, because they were all *without prejudice*; and while the pendency of these negotiations, as a matter of fact, though made without prejudice, may be looked at, and more particularly when engaged in at the suggestion of the Court, the contents of them ought not to be looked at for any purpose. The rule I understand to be that overtures of pacification, and any other offers or propositions between litigating

parties, expressly or impliedly made without prejudice, are excluded on grounds of public policy. And the offers in this case were of that character, for the purpose not only of putting an end to existing litigation, but to obtain an amicable arrangement between the parties for the future.

I do not think that the case cited of *Clark v. Grand Trunk R. W. Co.*, 29 U. C. R. 136, affects the general rule that letters written without prejudice are inadmissible. Richards, C. J., at p. 147, states the rule, and shows how it did not apply in that case. He says, "What I understand 'without prejudice' to mean, is that the party making it is not to receive any advantage from the proposition any more than the party rejecting it. When this protection is given to offers of settlement it should apply to all equally. Such I understand the rule to be, and there is an express decision that when a letter was written by one party to the other 'without prejudice,' neither the letter nor the answer to it was allowed to be given in evidence, although the answer was not expressed to be without prejudice: *Paddock v. Forrester*, 3 M. & G., 903. But here the defendants' attorney expressly reserves to himself the right to use the proposition against the plaintiff as showing his want of good faith and his fraud in setting up a claim when he was not injured at all. I think the plaintiff may well urge that he has equally as good a right to say, 'I will use the offers and the agreement subsequent thereto, and which probably sprung out of it, to repel the imputation cast upon me, and to show my entire fairness.' I also understand that the objection taken at the trial did not cover this ground for rejecting the letter. If so the authorities seem to show it cannot be used for that purpose now."

But if we look at the nature of the propositions that were in fact made, there does not seem to me to be anything in them to prejudice the position of the plaintiffs. While the plaintiffs contend for a qualified permission to use the tramway under the agreement of 1874, that did not exhaust the statutory power to grant a permission of a less

qualified or wholly unqualified, kind. It was still open to the defendants to ask, and to the plaintiffs to grant, power to use steam on the tramway, and the proposals on the part of the one or the other of them were made with the view of ascertaining if some common ground could be reached, by which the use of steam might be sanctioned without prejudice to the interests of the plaintiffs. These negotiations terminated, because the defendants would not assent to the safeguards that the plaintiffs thought essential. There does not appear in this to be any ground for ascribing dilatory and negligent conduct to the plaintiffs, or for alleging that they slept upon their rights, or can be considered to have waived them.

On the whole I think the plaintiffs are entitled to enjoin the defendants from the use of steam as a motive power on their tramway. The decree will be with costs. (a).

A. H. F. L

(a) This case has been carried to Appeal.

[QUEEN'S BENCH DIVISION.]

McCLUNG v. McCracken et ux.

Statute of Frauds—Sale of lands.

When A., whose wife owned a certain freehold property on St. George's Street, wrote to B., the owner of a certain leasehold property on King Street, with reference to the said properties, as follows, "If you will assume my mortgage, and pay me in cash, \$3,700, I will assume your mortgage of \$5,000 on the leasehold," and B. replied, "Your offer of this date, for the exchange of my property on King Street for your property on St. George Street, I will accept on your terms,"

Held, affirming the judgment of FERGUSON, J., 2 Ont. R. 609, not a sufficient memorandum of the contract to satisfy the Statute of Frauds, ARMOUR, J., doubting.

Held, also, in an action for specific performance of the above contract by B., correspondence between the solicitors of the parties of date subsequent to the date of the above letters, as also the requisitions respecting title which passed between the solicitors, were inadmissible in evidence.

Held, further, the fact that A.'s wife had signed a conveyance of the land in question to B., which conveyance had never been delivered, and did not, by recital or otherwise, set forth the contract relied on, could not assist B. in the action for specific performance.

THIS was an appeal from a decree of Ferguson, J., reported in 2 O. R. 609, where the facts are fully stated.

June 1, 1883. *Rose*, Q. C., for the appeal. The letter of 17th May, with the surrounding circumstances, is sufficient to bind McCracken. These, if not the requisitions, coupled with the deeds, make the whole transaction complete: *Fry*, Sp. Perf. 106; *Thomson v. Davenport*, 2 Sm. L. J., 8th ed., 392; *Gillatly v. White*, 18 Grant 1.

MacLennan, Q. C., contra.

November 23, 1883. HAGARTY, C. J.—The bill was filed for specific performance of an alleged contract for the exchange of certain leasehold property of plaintiff's for certain freehold property belonging to the female defendant, the plaintiff assuming the payment of mortgages thereon amounting to \$11,200, and that, as to the leasehold, the plaintiff would assign to defendants, or either of them, as they should elect, and would pay \$3,750 cash; and that defendants would assume payment of certain mortgages thereon amounting to \$5,000.

It appeared that there had been some verbal discussions and propositions between plaintiff and the male defendant, and that Messrs. Pearson, land agents, were in communication with the parties.

The only writing of any kind signed by either of the defendants is the letter of 12th May, 1880, from McCracken to the Pearsons, set out in the judgment below.

After stating that he had examined the King street buildings and did not like them, he adds :

“ Under these circumstances I do not feel disposed to entertain Mr. McClung's present offer. If he will assume my mortgages, amounting to \$11,200, and pay me in cash \$3,750, I will assume his mortgage of \$5,000 on the leasehold : this offer to remain open till to-morrow.

“ Or will sell him my south house for \$11,500 ; \$6,000 cash, balance on mortgage to suit his convenience.

“ Yours, &c., THOS. MCCRACKEN.”

This is addressed to Pearson Brothers.

Plaintiff writes the same day direct to the male defendant :

“ Your offer of this date for the exchange of my property on King street for your property on St. George street I will accept on your terms.”

Nothing further was produced in writing to shew the bargain.

The difficulty is to hold that there was any “ agreement, or note or memorandum thereof, in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.”

This is unaffected by any question as to the property not being owned by the male defendant. I cannot see how he has in any way, in writing, agreed to the contract sought to be enforced.

The letter makes no reference to any other letter or document, directly or inferentially. Any agreement on his part to exchange freehold property for leasehold on specified money terms can only be ascertained by evidence of what had previously passed verbally.

He says in the letter, in effect, I do not like the King street buildings, and therefore do not feel disposed to entertain Mr. McClung's present offer.

He then makes an offer as to the assumption of certain mortgages, naming the amounts, but without any reference to the properties, if any, covered in the \$11,200 mortgage.

It does not appear from the evidence whether the \$11,200 mortgage was really the mortgage of the male defendant, or the wife.

Verbal evidence would fully explain that the exchange of the two properties was the true subject matter of the discussion.

But it seems to me a marked disregard of the plain words of the statute to allow the verbal evidence to add to this offer as to the mortgages, "and on these terms I will sell or exchange the St. George street freehold for the King street leasehold."

If we had never heard of a decision on the statute, I think we could not hesitate for a moment in deciding that there was no agreement, or note or memorandum in writing, of the contract sought to be enforced.

The plaintiff's answer, declaring that he accepted defendants' terms for the exchange of the one property for the other, in no way helps the statutable objection, as defendants never answered the letter.

I have seen no case in which verbal evidence has been allowed to shew what was the whole substance of the dealing between the parties.

If two persons had verbally discussed a proposition to sell by one and to purchase by the other a certain property, and one had offered \$5,000, which the other declined, and they parted; and next day the proposed purchaser writes to the other, "I cannot agree to your offer, but make it \$6,000 and I agree;" I cannot see how we could hold this sufficient.

The *seller* writing back saying that he now will sell, specifying the lot, for the \$6,000 cannot, I think, help the matter.

Great latitude is allowed in the connecting of one writing with another, in order, out of the whole, to satisfy the requirements of the Act.

This is well explained by such cases as *Rossiter v. Miller*, L. R. 5 Ch. D. 648, cited in the Court below.

A verbal offer had been made to purchase. On behalf of the vendors a letter is written, stating that the offer had been considered and accepted, and the terms are duly recited. The defendant wrote back, acknowledging the receipt of the letter, and adding that, as it appeared that the vendors understood he would build at once he would not bind himself so to do, and that the offer had better be reconsidered unless they were prepared to leave him at liberty to do as he thought best.

To this the vendors replied that they did not intend their acceptance of his offer to be conditional, and that they did not want to bind him to build, and accepting unconditionally.

Lord Cairns's judgment in the Lords, L. R. 3 App. 1129, is very clear and satisfactory as to this being sufficient to satisfy the statute. (See the same case below, L. R. 5 Ch. D. 648.)

It was fair to read the letters together, and when the defendant acknowledged the receipt of the letter setting out and accepting his verbal offer, and objected simply to any understanding that he was bound to build, and suggesting that *on that objection* his offer should be reconsidered, he could well be assumed to accept in writing the terms of the contract set out in the plaintiff's letter.

The judgment points out expressly that up to the writing of the letter the defendant had incurred no obligation under the verbal negotiations, or the letter written by the plaintiffs.

It was argued in the case before us that the correspondence between the solicitors might be referred to to furnish evidence of the bargain.

I do not see that that can help the case. The solicitors were not in any way deputed or authorized by defendants

to make any bargain or contract for them; nor do they affect so to do. On this head I may refer to *Smith v. Webster*, 3 Ch. D. 570.

Even if admissible for the purpose, the correspondence does not define the bargain.

As to the deed signed by the defendants, I agree with the learned Judge that it cannot help the plaintiff's case.

The subject is partly dealt with in *Phillips v. Edwards*, 33 Beav. 440 (1864).

Some remarks of the then Chancellor, in *Gillatly v. White*, 18 Gr. 1, in 1870, might be urged in favour of plaintiff's argument. But the facts of the case were widely different so far as they are meagrely reported: no case is cited, and probably the supposed expression of opinion was unnecessary for the decision of the case.

I am of opinion that the claim is untenable under the Statute of Frauds.

In that view, it is not necessary to discuss at length the grounds on which the learned Judge dismissed the bill.

I am not prepared, at present, to accede to the opinion that if an otherwise sufficient contract under the statute had been proved, it would be void for the reasons stated in the judgment, viz., that the property is spoken of as the property of the male defendant, "without making any reference to any owner or proprietor but himself."

I do not think that either *Rossiter v. Miller*, or *Donnison v. Peoples' Cafe Co.* 45 L. T. N. S. 187, cited below, support the proposition.

The agreement under the statute, as said by Lush, L. J., in the last cited case, "the agreement must contain the name of the buyer and the name of the seller, that is, either the name or a sufficient description, that either party may know who he is dealing with; otherwise the statute is not complied with. * * You must indicate who authorizes the sale, and with such precision that the other party may know who he has to look to for the completion of the sale."

Lord Cairns says, in *Rossiter v. Miller* (p. 1141): "If I,

being really an agent, enter into a contract to sell Black-acre, of which I am not proprietor, or to sell the house No. 1 Portland place, on behalf of the owner of that house, there, I apprehend, is a statement of a matter of fact as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise."

The proposition is, A., duly authorized to sell C.'s house, contracts with D. to sell it as if it was his own, as thus, I agree to sell to you the house No. 1 Portland place for so much; that C., the true owner, cannot be sued on this contract. I hardly think the law is so.

This contract does contain the name both of a vendor and a purchaser, and so *primâ facie* complies with the rule. I think the undisclosed principal can be proceeded against on this contract, on proof of the agency in A.

The rule seems very clearly laid down in *Higgins v. Senior*, 8 M. & W. 844, in the well considered judgment of Parke, B.: "There is no doubt that where such an agreement is made it is competent to shew that one or both of the contracting parties were agents for other persons, and acted, as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals, and this whether the agreement be or be not required to be in writing by the Statute of Frauds, and this evidence in no way contradicts the written agreement. It does not deny that it was binding on those whom, on the face of it, it purports to bind, but shews that it also binds another, by reason that the act of the agent in signing the agreement in pursuance of his authority is, in law, the act of the principal."

This rule is adopted in *Calder v. Dobell*, L. R. 6 C. P. 486, and in Error, *Ib.* 499; *Evans*, Principal and Agent, 448-9; *Story* on Agency, 9th ed. (1882), sec. 160a; *Huntingdon v. King*, 7 Cush. 371. These are cases on personal chattels. The 4th and 17th sections of the Statute of Frauds are substantially the same.

In 2 Dart V. & P. 946, 5th ed., the law is stated, refer-

ring to *Higgins v. Senior*: "Where an agent contracts, apparently on his own account, and *prima facie* a person who signs in his own name contracts as principal, an action on the contract may be brought against either him or his principal."

But, as I have already stated, I can see no sufficient written evidence of bargain to satisfy the statute, it is not necessary to enter more fully into the cases bearing on this point as to principal and agent.

I think the motion before us must be dismissed, with costs.

ARMOUR, J.—I am inclined to the opinion, having regard to the decisions in *Newell v. Radford*, L. R. 3 C. P. 52, and *The Salmon Falls Manufacturing Co. v. Goddard*, 14 Howard 446, that the letters in this case constitute a sufficient memorandum or note in writing of the contract which is sought to be enforced to satisfy the Statute of Frauds; but I am not sufficiently confident of it to warrant me in dissenting from the judgment just delivered.

In other respects I agree with that judgment.

CAMERON, J., concurred with HAGARTY, C. J.

Motion dismissed, with costs.

[QUEEN'S BENCH DIVISION.]

HENDRIE V. NEELON.

Contract for sale of timber—Non-delivery—Loss of profits—Measure of damages.

The plaintiff contracted to deliver timber to the defendant at St. Ignace, to be transported by him to Quebec for sale there. There was no market nearer to the place of delivery than Quebec. The plaintiff made default and in action for the price the defendant counter-claimed for damages for non-delivery of the timber.

Held, CAMERON, J., dissenting, reversing the judgment of BURTON, J.A., that the measure of damages was the value of the timber at Quebec, less the cost of transportation thereto from the point of delivery.

Per BURTON, J. A., and CAMERON, J.—Loss of profits could not be recovered, and as the contract price for such timber had not varied, and there was no evidence of any contract by defendant to re-sell, which could be taken into consideration, or of any purchase by him to supply its place, there was no right to more than nominal damages.

THIS case, which had been heard before Mr. Justice Galt, was sent back for the purpose merely of receiving evidence of the facts connected with a counter-claim made by the defendant for damages for non-delivery of 9329 feet of timber, part of a larger quantity, which one MacDonald had contracted with the defendant to deliver at St. Ignace a point on Lake Michigan.

The trial took place before Burton, J. A., at the last Spring Assizes at Hamilton.

The learned Judge reserved the case, and subsequently delivered the following judgment, which contains a full statement of the facts:

The action itself was brought for the price of the timber actually delivered, and brought by the present plaintiff as the assignee of MacDonald's contract. The defendant can recover no part of his counter-claim from the present plaintiff, but it was contended, and properly so, in my opinion, that if he was entitled to damages for breach of the agreement he was not bound to part with the money in his hands, or to which MacDonald was entitled for the portion of the contract he had performed, until these damages were satisfied; in other words, that the

plaintiff can recover only the excess of MacDonald's claim over and above these damages.

The facts are not very complicated, but the principle upon which the damages are to be assessed is the real question of difficulty.

The particular description of timber which MacDonald contracted to deliver is required for export only, and is got out and forwarded to Quebec, and then shipped for England.

The usual course of business is for dealers in the position of this defendant to enter into contracts with jobbers, like MacDonald, to get out the timber, and, in the event of failure to perform the contract, it is not practicable, during the same season, for the dealer to get the same class of timber at the place where it was contracted to be delivered, inasmuch as all the timber got out is got out under similar contracts, either by other jobbers employed by himself, or by other dealers. Practically, therefore, the only place where a dealer, desiring immediately to supply a deficiency arising from a breach of contract to deliver, is Quebec.

The agreement in this case was entered into on the 13th December, 1880, to get out 36,000 cubic feet of wavey white pine board timber of certain dimensions, to be delivered at the port of Point St. Ignace before the 1st June, 1881; part deliverable in May and part in June, at the stern of vessels to be furnished by the defendant, at 19, 20, and 21 cents per cubic foot, according to the average size of stick—5 cents when the timber was manufactured at the stump, 5 cents more when hauled to a stream for floating down to the port of shipment, and the balance on shipment.

The contract prices for this description of timber did not vary to any appreciable extent during the winters of 1880, 1881, or 1882, nor did the price at Quebec materially vary during the same period.

There was default made in the agreement to the extent I have mentioned in the first winter. In August, 1881,

when it was referred to, the defendant proposed either to accept \$400 in settlement, or, as appears to be usual in this kind of business, to allow the contractor to go on and complete his contract during the following winter. MacDonald preferred the latter and the defendant merely intimated that he ought to get out enough for a full cargo, which would be somewhere about 18,000 feet.

During that winter MacDonald found himself unable to supply the deficiency, the limits where he expected to get the timber having changed hands, and he says that in December he notified the defendant's agent to that effect, in time to enable him to supply himself, although there is a conflict of evidence here, the agent saying it was not until February.

If it becomes important I incline to think that MacDonald's statement is the more likely to be the correct one, and I should so hold.

It was admitted that the defendant did not require this timber to enable him to fulfil any special contract, or that he sustained any peculiar injury from its non-delivery, but simply that he had lost the profits which he might have made upon it had it been duly delivered in the terms of the contract, or during the extended period.

It is clear that if the timber could have been procured at St. Ignace, all that the defendant could have recovered would have been the difference between the contract price and the market value at the time the contract was broken, because the defendant having the money in his hands could go into the market and buy; but this rule cannot apply where the goods cannot be obtained in the open market on the spot; or, perhaps, I should rather say, the same rule applies but is more difficult of application; but it comes back to the same point, what was the timber worth at that time and place?

One mode of arriving at this is, by showing, where it can be done, the actual loss which the vendee shows he has sustained. If, for instance, it had been shewn that in order to carry out a contract of his own he had gone into

the open market at Quebec, and had made good the deficiency by the purchase of 9,329 feet of timber at forty cents, that sum, less the contract price, and the expense of transportation to Quebec, amounting it is said to ten or eleven cents, would, I think, be the correct measure of damages, and would more than absorb the plaintiff's verdict; but that is not the present case, and I take it to be a well established rule of the common law that the damages to be recovered for a breach of contract must be shewn with certainty, and not left to speculation or conjecture. Profits which would certainly have been realized by a sale of the article bargained for under a sub-contract of sale, of which the vendor had notice, and which therefore must have been in the contemplation of both parties, are, I apprehend, recoverable; those which are merely speculative or contingent are not.

If the defendant in this case had actually himself contracted to sell again this timber, I incline to think he might have supplied the article in Quebec, charging his vendor with the difference, as I have above pointed out; or if it had been shewn that the timber had been purchased for a specific purpose to MacDonald's knowledge, then possibly the value at St. Ignace could have been ascertained by the price the defendant would have obtained from his vendee, *minus* the cost of delivering it to him. See *Borries v. Hutchinson*, 18 C. B. N. S. 445. But in the absence of any such contract I cannot say that there is any satisfactory mode of estimating the damages. It is true that it is shewn that the actual expense for freight and charges for transporting this timber would be some eight or ten cents; but these charges do not include insurance, and there may be other items; and when it is established that during the whole of the period covered by these transactions the same relative prices prevailed at St. Ignace and at Quebec, I find it difficult to say, in the face of the rule I have referred to, that the damages must be ascertained with certainty, and not left to conjecture, that any thing more than nominal damages have been sustained. If it had been shewn that

the price at Quebec had increased after the making of the contract, it might afford some criterion; but when it is shewn that the price was forty cents at the time the contract was entered into and also when the breach occurred, I find it difficult to say that it affords any satisfactory basis for estimating damages.

If the defendant had actually purchased other lumber of a similar character in Quebec, there would have been something certain and tangible on which to form a judgment, but the state of the English market, or a number of other circumstances, may have concurred to render such a purchase undesirable, and the matter is consequently left in that uncertain state as to afford no criterion for an estimate of the damages.

I think, for these reasons, that the defendant has not made out a case for more than nominal damages; but as there was a clear breach of the contract, and the question is a new one, not free from doubt, I think that I should give a verdict for that nominal amount, with costs.

June 3, 1883. *Osler*, Q.C., moved to increase the judgment in favour of the defendant, on the ground that the defendant was entitled to substantial damages for breach of the contract, and the evidence of counter-claim supported such claim. He contended that the defendant was entitled to the fair market price, supposing the contract had been performed, but not to any extraordinary profits. He cited *Borries v. Hutchinson*, 18 C. B. N. S. 445; *Dunlop v. Higgins*, 1 H. L. 381; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Cory v. Thames Iron Works Co.*, L. R. 3 Q. B. D. 181; *Griffin v. Colver*, 16 N. Y. 489; *Thol v. Henderson*, L. R. 8 Q. B. D. 457.

E. Martin, Q.C., contra. It was not in contemplation of the parties that the damages should be based on the value of the timber at Quebec. This appears from the fact that the contract price was twenty cents per foot, and the damages asked are about fifty per cent. of the contract price, notwithstanding that the evidence is, that the price of the

timber contracted for was the same at St. Ignace and Quebec during 1880, 1881, 1882, and 1883. The true measure is different in getting out timber, and in delivering it at the ship's side at St. Ignace in any of these years. It was proved that the unperformed portion of the contract extended until December, 1881, and then the Judge found McDonald gave notice to plaintiff of his inability to fulfil it at a time when he could have got the short quantity at the contract price, which shewed there was really no damage. The measure would be the sum which the plaintiff could have got from the insurance company had the timber been burnt or lost at St. Ignace. See *British Columbia, &c. Co. v. Nettleship*, L. R. 3 C. P. 499; *O'Hanlan v. Great Western R. W. Co.*, 6 B. & S. 484. Then there was no proof of the value of the timber at Quebec in December, 1880, 1881, or 1882; and from the figures given by Neelon it is clear the alleged profit was composed of items fluctuating, and no allowance for insurance was made from St. Ignace to Garden Island, or any other commercial risk. The damages were speculative, resulting from the momentary condition of the market. Neelon had the use of the unpaid balance of timber delivered from August, 1881, to January, 1883. Whether the breach is to be considered as made in July or August, 1881, or in December, 1881, the price would be the same, and hence there was no damage: *Hobbs v. London and South Western R. W. Co.*, L. R. 10 Q. B. 111; *Wiggshall v. Indigent School for the Blind*. L. R. 8 Q. B. D. 357.

November 23, 1883. HAGARTY, C. J.—It seems clear that the contracting parties in this case were fully aware of the usual course of trade in this particular kind of timber. It was to be sent down to Quebec for shipment to a foreign market, the contract requiring delivery at the stern of vessels sent by Neelon for the timber.

It was also clear that when default was made in furnishing the timber at the stipulated price it was not in Neelon's power to supply himself up there with a similar article at

any price. The evidence showed that the required timber could not be purchased ; the parties engaged in getting out such timber being only willing to sell out their contract, whatever it might be.

There was in fact no market and no market price to regulate the application for the usual rule as to damages for the non-delivery of goods purchased.

The ordinary contract price for the manufacture and delivery at the ship at Sheboygan, in Michigan, had not varied for several seasons.

The Quebec market price for the same article had also been the same for some seasons.

The cost of transport from Sheboygan to Quebec was proved with sufficient certainty, the charges being well known.

I think it was demonstrated, as clearly as any such case could be proved, that the vendee would have made a profit from eight to ten cents a foot on all the timber which should have been delivered, after payment of all charges.

In my judgment the law must be in a very defective state, if the argument be sound, that in such a state of things only nominal damages can be recovered.

Had the vendee obtained the timber according to contract its value to him would, beyond question, have been what it would be worth in the nearest available market, less the ordinary costs of transportation and placing it in that market.

The constantly cited rule in *Hadley v. Bakendale*, 9 Ex. 341 ; “ Where two parties have made a contract which one of them has broken the damages which the other party ought to recover in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the con-

temptation of both parties, at the time they made the contract, as the probable result of the breach of it." See the remarks on this rule of Blackburn, J., in *Cory v. Thames Iron Works*, L. R. 3 Q. B. 181.

Tried by either of these suggested tests the present claim seems to me to be supported. The damage to the vendee from not getting the timber at the contract price arose naturally and in the ordinary cause of things from the breach; and (2) must have been in the reasonable contemplation of the contracting parties as the probable result of the breach.

A. agrees to deliver to B. a foot of timber on Lake Michigan for ten cents. He knows it is to be sent to a distant market, there being no market on the spot. At an expenditure of ten cents more this foot of timber in the nearest market can be sold for thirty cents. The direct damage and loss to B. from A.'s failure to deliver seems naturally to be ten cents.

But it is argued that is the vendee's supposed profit and that prospective profits cannot be recovered.

The case of *Wilson v. Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 632, illustrates this. There was actionable delay in the delivery of cloth which the plaintiff required to make caps for the opening season. He was allowed to recover as damages the amount of the diminution in value of the cloth by reason of the season for selling it having passed, but not for the loss of anticipated profits from the sale of caps made from the cloth.

The subject is very largely discussed in 1 Sedgwick 218 (7th ed.) and all the cases reviewed, English and American.

A leading case is much noticed, *Griffin v. Colver*, 16 N. Y. 489.

Selden, J., says, "It is a well established rule of the Common Law that the damages to be recovered for a breach of contract must be shewn with certainty and not left to speculation or conjecture; and it is under this rule that profits are excluded from the estimate of damage in such cases, and not because there is anything in their nature

that should *per se* prevent their allowance. Profits which would certainly have been realized but for the defendant's default are recoverable ; those which are speculative and contingent are not."

He notices that where a vendor or common carrier fails to deliver goods, the market value at the place of delivery determines the damages, though that is an allowance of profits.

The whole judgment with Mr. Sedgwick's comments are very instructive.

Rice v. Manley, 66 N. Y. 82, Court of Appeal. Cheese was contracted for in Cattaraugus County for the New York market. It was proved that the New York market controlled the price of cheese in the county. The only market for cheese in that county was for transportation to and sale in New York ; hence it was competent to prove the value of this cheese in New York, and the cost of transportation there, with a view of placing before the referee facts that would enable him to estimate the plaintiff's damage.

Sedgwick, 7th ed. p, 232, cites this case. *Durst v. Burton*, 47 N. Y. 174, may be also referred to.

Harris v. Panama R. W. Co., 58 N. Y. 660, was an action for a horse killed on the Isthmus on the way to California. It was shown that there was no market price for such a horse on the Isthmus. Proof was allowed of the market value at San Francisco. The Court told the jury they were to use that proof to enable them to answer the question of the value at the time and place of the injury. Held, no error: that where there was a market value at the time and place, that is the most suitable means of ascertaining value, but not the only one ; but that this species of evidence would only be completely reliable where it appears that similar articles have been bought and sold in the way of trade in sufficient quantity or often enough to show a market value ; and in the absence of such proof of value at some other place was admissible, in which case the place of destruction was the most natural resort

to supply the needed proof, it being resorted to, however, only to enable the jury to answer the enquiry as to the value at the place of the actual loss, great deduction being made for the risk and expense of further transportation.

Heinemann v. Heard, 50 N. Y. 37, is worthy of note. The action was against plaintiff's agents in China, for not purchasing silks at a named price, (which they could have done) for shipment to New York. Evidence was given of the market price in New York when they might have arrived. The Court said: "We are not prepared to sanction the idea that the rule adopted in the case of marine trespass" (loss by collision, &c.,) "which is the prime cost or value of the property at the time of the loss, with interest, is necessarily applicable to the case of the violation of a contract entered into for the express purpose of procuring goods for sale at their place of destination, when their market value at that place can be shewn. The fact that damages have been sustained must be proved with reasonable certainty; but even a loss of profits, if within the contemplation of the parties at the time of entering into the contract, and a direct consequence of the breach, and not speculative or contingent, may be recoverable,"—citing *Griffin v. Colver*, *supra*; *Cunningham v. Bell*, 3 Peters, 85, (per Marshall, C. J.).

In Masterton v. Mayor of Brooklyn, 7 Hill 61, the subject is fully discussed by Nelson, C. J., at pages 68 and 69 *et seq.*, and the difference between speculative profits and those which are the direct and immediate fruits of the contract between the parties. This case is fully discussed in *Mayne*, 3rd ed., 45. He says; "The distinction pointed out in this judgment between primary and secondary profits furnishes the key to the English cases in which profits have been admitted and rejected as an element in the damages allowed."

At p. 43: "One very common instance in which damages are held to be too remote arises where the plaintiff claims compensation for the profits which he would have made if the defendant had carried out

his contract. It is by no means true, however, that such profits can never form a ground of damage. There are many cases in which the profit to be made by the bargain is the only thing purchased, and in such cases the amount of that profit is strictly the measure of damages. * * But when the thing purchased is a specific article the only benefit that can be allowed for in measuring the damages will be the value of that article, with differences between the contract price and that at which it could have been purchased elsewhere." At page 153 the question is discussed as to the non-existence of any market. He comments fully on the case of *Borries v. Hutchinson*, 18 C. B. N. S. 445. and says: "Cases of the sort appear to, be complicated by varying elements which are really only different tests for answering the question, 'What was the article worth at the time?'"

Borries v. Hutchinson was a very elaborately argued case, reviewing the English and American authorities. Defendant had undertaken to deliver a large quantity of caustic soda, a commodity not ordinarily procurable in the market. He was to deliver it on the rail at Liverpool to be sent to Hull, and he knew plaintiff was buying to re-sell to a foreign correspondent. Default was made in delivery, except of about one-third, and that was delivered after the appointed time. Plaintiff had re-sold the whole at an advance to a dealer in St. Petersburg, who again re-sold at an advance to another dealer. The amount delivered was forwarded by plaintiff so late in the season that he had to pay extra freight and insurance. He also had to pay to his Russian vendee the amount the latter had to pay his sub-vendee for default of delivering. Plaintiff claimed all as damages. He was allowed to recover the extra freight and insurance, and also the advanced price at which he had sold to his St. Petersburg vendee; in other words, the loss of profit on the re-sale, but not the amount which plaintiff had paid the vendee to compensate the sub-vendee for the loss of his bargain. This latter was held to be too remote.

Erle, C. J., and Willes, J., deliver judgment. They point out that where there is no market price to determine the damages, another principle must be resorted to, and the plaintiff is here entitled to recover under the rule in *Hadley v. Baxendale*.

Willes, J., at p. 465, says: "We must therefore ascertain what was the value of the article contracted for at the time it ought to have been, and at the time when it actually was delivered. Now the value of such an article as this depended upon the existence of facilities for its transport to the place for which it is destined." On this case it is said at page 153 of Mayne: "It is obvious that the liability to the profit upon the re-sale was determined by exactly the same consideration. The value to the plaintiff of that portion which was never delivered, was the price which he would have got for it in Russia, minus the cost of getting it there."

O'Hanlan v. Great Western Railway Company, 6 B. & S. 484. The head note is: "In an action against a railway company for non-delivery of drapery goods the measure of damages is the price at which the goods can be obtained in the market, if there be one at the place and time at which they ought to have been delivered. If not, the damages must be ascertained by taking into consideration, in addition to the cost price and the expense of transport, the reasonable profit of the importer."

Blackburn, J.: "Now the value of the goods at the place of delivery must be the market price, if there is a market there for such goods. If there is not, either from the smallness of the place, or the scarceness of the particular goods, the value at the place and time of delivery would have to be ascertained as a fact by the jury, taking into consideration various matters, including, in addition to the cost price and expenses of transit, the reasonable profits of the importer, which are adjusted by what are called the higgling and bargaining of the market. * * Where there is no market, from the nature of the thing, no evidence of what the importer's profit is can well be given,

and the jury must say what is the fair and reasonable profit which persons in the ordinary course of business would be likely to make."

The judgment of Shee, J., is to the same effect.

The subject is further discussed in *Williams v. Reynolds*, in same volume, 495.

I need not cite the other cases that are referred to in the text books.

In reference to a re-sale by vendee, on the faith of receiving the goods as stipulated, it is said in Mayne, p. 154: "In reality, however, the re-sale is an immaterial circumstance, except so far as it may go to prove what the real value was at the time of the breach." See also *Thol v. Henderson*, 8 Q. B. D. 457, as to re-sale. I also refer to *Budge v. Wain*, 1 Starkie 504.

I am of opinion that Neelon is entitled as damages to the value of the timber at Quebec, the market for which in the proved course of trade and in the reasonable contemplations of all parties it was destined, less the cost and changes of transport from the point of delivery thereto, and that there was no other or nearer market available to regulate the value of such timber.

I consider that what Neelon contracted to purchase was that timber, and the profit he could make thereon by selling the same in the nearest, that is, the Quebec market: that this profit has been proved clearly and distinctly; and that the value of the timber at the point of delivery was to Neelon the value at the market of destination less transport charges.

The distinction seems to me clear between this species of profit and profits claimed to be capable of being made by the use of the timber in building of houses or the manufacture of furniture or other articles therefrom.

I am of opinion that where there is no available market at or near the point of delivery to fix the value, that recourse can be had to the nearest market, in the present case the Quebec market, the one really contemplated.

The learned Judge who tried this case considered that the

evidence as to such expense as insurance was not clear. As I understand it, defendant's vessel carried the timber to Garden Island and it was rafted from thence to Quebec, the persons rafting guaranteeing delivery of every stick received by them. Neelon's evidence shews that two and a half cents covers "river insurance and everything." Six cents a foot was the freight from St. Ignace to Garden Island. Neelon was not asked any question as to insurance down to Garden Island. Norris said he himself never insured timber down to there and did not know the rates. Neelon said he could have sold this in Quebec at forty cents, and had a contract with a party. On plaintiff's objection he was not allowed to state this. There was also evidence that in the opinion of parties when this contract was broken such timber could not have been obtained at Sheboygan that season under thirty cents per foot.

I think, on the whole, then, nine cents per foot should be allowed as damages to Neelon on the 9329 feet not delivered. I take forty cents to be the proved value in Quebec, and that thirty-one cents would fairly pay the contract price at the point of delivery and the cost of transport, insurance, &c., to Quebec.

This would leave the verdict on the counter-claim \$839.61.

ARMOUR, J., concurred.

CAMERON, J.—I am unable to concur in the conclusion that has been arrived at by my learned brothers, and think the judgment of the learned Judge at the trial ought not to be disturbed. The question of the measure of damages is a most difficult one to deal with, and has been most fruitful in the production of judicial decisions and opinions which it might prove an impossible task to reconcile with each other. But there are certainly general rules or principles which would seem to be recognized in all. The rule is fixed and established that where the subject of a contract is a marketable commodity readily procurable in

the market, the measure of damages for breach of contract to supply the article is the difference between the contract price and the market value of the article at the time and place of delivery. Another is, that profits, *qua* profits, are not recoverable. A third is, that where the subject of the contract is peculiar and is not readily procurable in the market, the first mentioned rule does not apply, and the actual damages caused by a breach of contract to deliver the article must be arrived at by other means and according to the circumstances of each case. The damage is to be proved, not assumed. These rules are all subject to the guiding conditions laid down in *Hadley v. Baxendale*, 9 Ex. 341, which was a case in which profits were refused, that the damages shall be such as may fairly and reasonably be considered as arising naturally or according to the usual course of things from the breach of contract, or such as may reasonably have been supposed to have been in the contemplation of both parties at the time of the contract.

The reason for the first rule would seem to be, because the buyer can go into the market and supply himself at the time of the breach with the article, and if he has to pay more for it he is injured to the extent of the increase in price ; and the seller, if the buyer refuses to accept, has a right to go into the market and sell, and if he fails to get as much as the contract price he has lost the difference. When a person buys an article it is supposed in law that he wants it, and he is entitled to have it at the expense of the seller if he has to pay more for it than the contract price ; but where it is a marketable commodity, readily procurable, the law presumes that the buyer will procure it and, gives him the increase in the market price to enable him to do so. If the buyer does not supply himself with the article he has put in his pocket the difference in price, and thereby has made a profit of the transaction ; but still he does not receive the money under the law as a profit, but on the assumption that he has in fact procured, or will procure, the article he contracted for ; and as I understand the law, the rule is not so broad as to entitle the party not

in default for a breach of contract to recover against the party in default as well for gains prevented as losses sustained, unless the contract is made concerning some marketable commodity, or specially in reference to some other contract by the performance of which profit may be made or by non-performance special loss sustained, and that such loss or gain was in the contemplation of the parties in making the contract. That profits as profits are not recoverable has been established by many decisions. *Wilson v. Lancashire and Yorkshire R. W. Co.*, 9 C. B. N. S. 632, is to this effect ; and in *Elbinger Actien Gessellschaft v. Armstrong*, L. R. 9 Q. B., at p. 479, Blackburn, J., uses the following language : " As the plaintiffs did not actually lose more than a rouble a day, which they paid, that forms the extreme limit of the damages they can recover, for they are not entitled to make a profit out of the defendant's default."

The third rule, as I have above stated it, is to be found formulated in *Hobbs v. London and Great Western R. W. Co.*, L. R. 10 Q. B., p. 120, thus : " Where there is a contract to supply a thing, and it is not supplied, the damages are the difference between that which ought to have been supplied and that which you have to pay for, if it be equally good ; or if the thing is not obtainable, the damages would be the difference between the thing which you ought to have had and the best substitute you can get upon the occasion for the purpose." It appears to me the present case comes more nearly within this rule than the others. And under the decision in the case in *Elbinger Actien Gesellschaft v. Armstrong*, from which I have already extracted a part of the judgment of Blackburn, J., it might have been competent for the learned Judge at the trial to have taken into his consideration that the timber at St. Ignace was actually of more value to the defendant by reason of his having facilities for its transport to Quebec, where it would have realized to him a larger price than he was paying for it ; but he was not bound as matter of law to treat that fact as entitling him

to the difference between the agreed price and the Quebec market value; and considering all the circumstances he only allowed nominal damages. The American decisions, while valuable for the sound reasoning they contain, are not authorities binding upon the Courts here, and when at variance with English or Canadian decisions must be disregarded. But I do not think there is a decision that goes the length of holding that where there is no market at the place of delivery fixed by a contract, that the prevailing price in the market where the buyer intends to sell is to be regarded as providing one of the data by which the measure of damages must be determined.

The case of *Rice v. Manley*, 66 N. Y. Court of Appeal 82, referred to by the Chief Justice, does not so determine. It merely decides that where the market in one place is controlled by the market in another place, the market price in such other place may be proved and considered in estimating the damages caused by the breach of contract to deliver goods at the first-named place, there being no independent market in such place. *Harris v. The Panama R. W. Co.*, 58 N. Y. 660, is opposed to English authority, if it is to be taken to decide that for breach of contract to carry a horse which is killed before it reaches its destination, the value of the horse at the place of its destination, if there is there a market for such an animal, and if not the nearest market thereto, and not the value at the place of destination, is the measure of damages for the failure to perform the contract of carriage. The measure in such a case, according to English decision, would be the market value of the animal at the agreed place of delivery, if an article like the thing carried can be supplied there; if not, then the cost of the thing in the market where it could be procured, with the expense of carriage and a fair importer's profit added. *O'Hanlan v. Great Western R. W. Co.* 6 B. & S. 484, is to that effect; not because the plaintiff was entitled to profit, but on the ground that he was entitled to have the thing he delivered to the carrier redelivered to him at the agreed place, and no importer

would supply it at that place without some profit or remuneration, and so the value of the thing at that place was necessarily the original cost, the expense of transport and the importer's profit.

If the defendant in this case had bought timber elsewhere and carried it to St. Ignace, in law he would have been entitled to recover from McDonald what it cost him so to do over the agreed price, if that cost was not an unreasonable expense under the circumstances to incur. If it was tested by what a prudent man would do without having any one to look to for compensation, it would not be recoverable ; but in estimating what, under the circumstances, the reasonable damages to the defendant would be, it would be competent to the Court to allow more than nominal damages, because, in truth, the defendant would actually have incurred, though imprudently, the expense in consequence of McDonald's default. *Elbinger Actien Gesellschaft v. Armstrong*, and *Le Blanche v. London and North Western R. W. Co.*, L. R. 1 C. P. D. 286, sustain this view. Now, if the learned Judge had allowed something to the defendant, I presume his finding could not have been disputed on the ground that in law the defendant was only entitled to nominal damages. But by his finding he has determined that the defendant has in fact sustained no substantial damages, and without being able to place my finger on the actual damage he has suffered, I am quite unable to say the learned Judge was wrong. If the Quebec market price is to govern, then undoubtedly there would be evidence of a substantial prevention of gain though of no actual loss.

It is conceded that if the defendant had bought from McDonald a thousand feet of lumber to be manufactured into bureaux, the value of the bureaux, less the cost of labor in making in excess of the original price of the timber, would not be the measure of his damages for failure by McDonald to deliver the timber. The value of the bureaux would include both profit on the timber and labour in the manufacture. Is there a sound distinction between the

profit arising from the manufacture of the bureau and from the transport of the timber to Quebec? The price in Quebec includes compensation for the trouble, risk, and expense of transport and cost of getting out the timber. Should a breach of the contract to deliver the timber at St. Ignace entail upon McDonald the obligation to make good the profit on the enhanced value of the timber caused by such additional expense, risk, and labour in taking it to Quebec? The only difference between timber converted by labour into furniture and timber carried to Quebec is, that in the latter case the shape of the timber remains the same, while in the former it is changed. In both it is the additional labour that gives it its increased value.

To hold that McDonald was liable to the Quebec market value is to hold him liable as if he had contracted to carry to Quebec; and if he could be so held, then, if the defendant had said to him, when and before the contract was made, I intend to sell my timber at the Cape of Good Hope or the Sandwich Islands, he would be liable to make good to the defendant the loss of profit determined by the value of the timber in these markets, with the expense of getting it there deducted. I do not think it can reasonably be said that such damages were in the contemplation of the parties, or naturally flow from the breach of the contract.

Before the profit in Quebec, the Cape of Good Hope, or the Sandwich Islands, could arise many things would be done, and many contingencies might arise so as to make that profit a remote and speculative theory. The price of timber at St. Ignace and Quebec remained the same; the defendant supplied himself with it in large quantities the following season at the same rate. At most his loss is in having been delayed in realizing a profit on this quantity for a season. Assume that the defendant had refused to accept the timber, what would McDonald's damages have been? Could he have been told: "Take your timber to Quebec, and there you will get ten cents a foot more than defendant agreed to pay over and above all cost of taking it there, and you have therefore sustained no damage?" Or, on the

the other hand, could he say, "There is no market this season in St. Ignace. I can't sell now ; it is worthless, and you must pay me the full price ; though, it is true, next season I can get for it the full price you agreed to pay me?" Surely his actual damage would be the interest lost by him on the contract value up to the time of sale.

The damages in every case of breach of contract must depend on the circumstances of each case, and must be decided according to such circumstances, the Court being guided in coming to a decision by the general principles applicable to the particular case on trial. I am therefore of opinion the defendant's motion should be dismissed, with costs.

*Judgment for defendant on counter-claim for
\$839.61.*

[QUEEN'S BENCH DIVISION.]

LEVOY V. MIDLAND RAILWAY COMPANY.

Railway company—Train moving backwards—Negligence.

The defendants were required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train.

Held, that the defendants did not comply with this direction by having a man at the front end of the last car, where he could not see persons crossing the track.

In this case there was no brake at the rear end of the last car. The brakeman on the last car, seeing the track clear a few minutes before the accident, went to the front end, and the plaintiff then attempting to cross, was injured.

Held, evidence of negligence to go to the jury.

ACTION for negligence. Trial at the last Fall Assizes, at Lindsay, before Hagarty, C. J., and a Jury.

Defence: not guilty, by statute.

The facts shortly were, that a train of cars belonging to the defendants was moving reversely along a street in the town of Lindsay. The plaintiff, a child of six years old, was lawfully and without negligence on his part crossing the track in front of the train, where, as he said, his foot caught in the track, and he worked and worked, and could not get it out, and he had to let the cars go over it. A brakesman was on the last car, a passenger car, at the time, but not at that end of it where the accident happened. He said he had been at that end just before, and seeing the track all clear, had gone back through the car to the other end. When he got there he again looked out, looking under the car, and saw the boy struggling on the track. He at once put on the brakes, and stopped the car in about a car length or so. He had not seen the boy approaching the track. It also appeared that the brake at the rear end of the car was useless, but the train hands said that even if it had been in working order the brakesman could not possibly have pulled up the train with it in time to have

prevented the accident. There was other evidence which for the present purpose it is unnecessary to consider.

The jury found a verdict of \$1,000 for the plaintiff.

November 29th, 1883, *Bethune*, Q.C., and *Biggar*, moved to set aside the verdict, and enter a nonsuit, on the ground that there was no evidence to go to the jury, and that there was contributory negligence.

They contended that the boy saw the train, and could have avoided the accident, and had all the warning a man could have given him, even had the latter been differently placed on the train. They referred to *Davey v. London and South Western R. W. Co.*, L. R. 11 Q. B. D. 213.

Hudspeth, Q. C., contra, referred to *Stubley v. London and North Western R. W. Co.*, L. R. 1 Ex. 13; *Lett v. St. Lawrence and Ottawa R. W. Co.*, 1 O. R. 545.

December 7, 1883. OSLER, J. A., (a)—The only question is, whether there was any evidence of negligence which could not properly have been withdrawn from the jury. If there was, the motion for the nonsuit must fail, and the defendants say they do not press for a new trial.

The defendants are required by law to station on the last car of a train moving reversely in any town, &c., a person who shall warn parties standing on or crossing the track of the approach of the train. I think a jury might properly be told that a man inside such a car attending to the stove, or looking after the passengers, or outside of it attending to the brakes at the end nearest to the engine, could not be said to be a person stationed on the car for the purpose of giving warning, &c., and in the charge of the learned Chief Justice in this case, it was properly assumed that the company were wrong in not having a man at that end of the car where only he could be of any use for that purpose. Therefore, when the accident happened, the defendants were failing to comply with the express provisions of the statute, and that was an

(a) CAMERON, J., being a shareholder in the defendant company, declined to sit in the case.

act of gross negligence: See *per* Amphlett, B., in *Williams v. Great Western R. W.*, L. R. 9 Ex. 162. The jury were asked whether the want of this precaution was the cause of the accident, and I think they might not unreasonably infer that it was, or that the accident might but for this act of negligence have been prevented, as the brakesman said that when he left the rear end of the car to attend to his other duties at the opposite end, the plaintiff was not in sight. The latter must therefore have approached the track and begun the attempt to cross while the former was passing through the car. Had he remained stationed at the rear of the car he would in all probability have seen the plaintiff approaching or about to cross the track, and might have been able to warn him in time.

Again, considering that one of the brakes was defective, and that there was but one man to perform the double duty of warning the public and of braking the car, I think the jury might well have been asked whether in these circumstances—the train being propelled along a public street where children and others were likely to be crossing, and moving up and down at any time—there was a neglect of what might fairly and reasonably have been expected from the railway company for the protection of the public. If the jury thought there was, and that the accident resulted from it, I cannot say there was not evidence to justify such a conclusion.

In *Stokes v. The Eastern R. W. Co.*, 2 F. & F. 695, Cockburn, C. J., directed the jury thus: "Lastly, even assuming that the accident was not caused by the company's servants, might it have been prevented or mitigated by a better use of brake-power? It is not to be disputed, because the universal use of brake-power is an acknowledgment of its necessity, * * that brake-power ought to be used. Are you of opinion that the absence of a second brakesman, or the not putting the single one on the rear, was negligence on the part of the company? You must consider the question as practical men, and if you think

there was a neglect of what might fairly and reasonably have been expected from the railway company * * * that would be negligence."

I think the case was rightly left to the jury, and that the order *nisi* should be discharged.

HAGARTY, C. J., and ARMOUR, J., concurred.

Order nisi discharged.

A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON PLEAS DIVISIONS

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

ACQUIESCENCE.

In right of way.]—See RAILWAYS
AND RAILWAY COMPANIES, 4.

ADMINISTRATION.

Right of creditor to.]—See EXECUTORS AND ADMINISTRATORS.

AGENCY.

See PRINCIPAL AND AGENT.

AGREEMENT.

Agreement—Construction—Implied qualification—"Traction engine"—"*Without prejudice.*"—When a road company, empowered by statute to run a traction engine over the highways of a certain county, entered into an agreement with the corporation of the county, whereby, after reciting the said statute, it was agreed

that the company should be at liberty to lay down a tramway along a certain road, that tolls to be collected should not exceed seven cents, for cars drawn by one horse, and ten cents for cars drawn by two horses; that the company, if required, should should run two passenger cars daily each way, or in lieu thereof an omnibus or sleigh, that in case horses, carriages, teams, or other vehicles or animals met the horses, waggons, carriages, or other vehicles of the company, the latter should have the right of way, and that "so soon as this agreement shall have been ratified by the said corporation, the said company shall forthwith withdraw their said traction engine from the public highways of the said county, and shall discontinue the use of the said traction engine, and of any other traction engine upon or along such public highways;" and the company insisted on their right, under this agreement to run a steam motor upon their said tramway.

Held that, though the words "traction engine" must be understood in their ordinary sense, as an engine running on the roadway itself, and not on a tramway, yet the above stipulations themselves were such that a qualification must be implied in the agreement excluding the use of steam as a motive power altogether, and indicated that horses were the kind of power, the use of which was completed by the parties to the agreement to be used in the traction of the cars.

Held, also, that the fact that the company for several years after the said agreement used horse power only, was not to be overlooked as evidencing the true agreement of the parties.

Overtures of pacification, and any other offers or propositions between litigating parties, expressly or impliedly, made "without prejudice," are inadmissible in evidence on grounds of public policy, although the pendency of such negotiations as a matter of fact may be looked at. *The Corporation of the County of York v. The Toronto Gravel Road and Concrete Co.*, 584.

ALIMONY.

Foreign divorce.]—See HUSBAND AND WIFE, 3.

ALTERATION.

Material.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

AMENDMENT.

See BILLS OF EXCHANGE, AND PROMISSORY NOTES, 2.

ARREST.

Ca. sa.—*Power of Divisional Court to review action of Judge—Misleading statements in affidavits—Residence.*]—*Held*, that a divisional Court may review the action of a Judge in setting aside a writ of *ca. sa.* and the arrest thereunder, and also his action in making the order to arrest.

Held, also, on the evidence, set out below, that the defendant could properly be treated as a resident of this Province.

Held, also, that a statement in the affidavit on which the order to arrest was founded, that the defendant had made "an assignment of all his property," without adding "for the general benefit of all his creditors," was of itself objectionable, as leading to the belief that the assignment was fraudulent, but apart from this there was sufficient stated to justify the issue of the order. *Cartwright v. John Hinds and Mary Hinds*, 384.

ASSAULT.

By standing in front of horses.]—See JUSTICES OF THE PEACE.

ATTORNEY GENERAL.

As a party.]—See WATER AND WATERCOURSES, 2.

ATTORNEYS AND SOLICITORS.

1. *Solicitors—Striking off the rolls—Partners—Absence of personal misconduct—Summary jurisdiction.*]—To justify an order to strike a solicitor off the rolls there must be personal misconduct; it is not enough

to show that his partner has been guilty of fraudulent conduct, from which a constructive liability to pay money may perhaps arise. The Court is not in the habit of exercising even the lesser jurisdiction of ordering payment in a summary manner against a solicitor to whom personally no blame is attributable, though he may be responsible for his partner's acts.

St. Aubyn v. Smart, L. R. 3 Ch. 646 distinguished. *Re McCaughey and Walsh, Solicitors*, 425.

2. *Right to sue for bill of costs.*]—*See* PLEADING, 1—COUNTY ATTORNEY.

BANKS.

Banks and banking—*Sale of machine by bank*—*Warranty*—34 Vic. ch. 5 (D.)—*Division Courts*—*Res judicata.*]—By the Banking Act, 34 Vict. ch. 5 (D.), banks are prohibited from buying and selling goods or merchandize :

Held, therefore, that an action would not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine.

In an action in the Division Court against the now plaintiff, on the notes given by him for the price of the machine, the question of the warranty was tried and decided against the now plaintiff.

Held, that the matter was *res judicata*, and the judgment in the Division Court was therefore a good defence, by way of estoppel, to the present action. *Radford v. The Merchants Bank*, 529.

BANKRUPTCY AND INSOLVENCY.

1. *Fraudulent preference*—*Pressure*—*Innocent purchaser*—*R. S. O. ch. 118.*]—Where T., being then insolvent, transferred to A., one of his creditors, all his estate and effects, and it appeared that the impelling cause of the transfer was the application of A. to be paid or protected, and the present plaintiff, also a creditor, sought to set aside the said transfer as a fraudulent preference.

Semble, the transfer was not “voluntary” within R. S. O. ch. 118, and could not be set aside.

Before the present proceedings, A. had transferred the said effects for value to a *bonâ fide* purchaser.

Held, that A. could not, in any event, be called on to make good the value of the goods, as if he were a debtor of the plaintiff. *Stewart et al. v. Tremain et al.*, 190.

2. *Interpleader issue* — *Chattel mortgage*—*Description of property*—*Pressure* — *Preference* — *Waiver* — *Costs*—*R. S. O. ch. 118.*]—R. being a creditor of A., applied to him to give security for his debt, and, under threat of suit, procured from him a chattel mortgage on his stock-in-trade. Although R. knew A. to be in difficulties, and had also the means of learning that he was insolvent, it did not appear that he actually knew that A. was insolvent when he obtained the mortgage ; while the mortgagor sought to gain time and to go on with his business.

Held, that the mortgage given under such circumstances was not a fraudulent preference within R. S. O. ch. 118. *Segsworth v. Meriden Silver Plating Co.*, 413.

3. *Fraudulent preference—Pressure—Cognovit actionem—R. S. O. ch. 118.*]—Where an execution creditor filed his bill claiming priority over a certain judgment and execution obtained upon a *cognovit actionem* given by one F. to M., another execution creditor, on the ground that the same was fraudulent and void under R. S. O. ch. 118, and it appeared that the *cognovit* was not voluntarily given, but was the result of clear pressure on the part of M.

Held, that the transaction was protected, and the judgment and execution of M. could not be impeached.

Brayley v. Ellis, 1 O. R. 19, followed. *Martin v. McAlpine et al.*, 499.

4. *Estoppel—Accepting a dividend at sale by an assignee of an insolvent.*]—The plaintiff, an execution creditor, purchased at a sheriff's sale under execution, certain lands of which the registered title was then in the execution debtor; but in a subsequent suit, by the assignee in insolvency of the husband of the execution debtor, to which, however, the plaintiff was no party, the conveyances, whereby the lands had been transferred from the insolvent to his wife, the execution debtor, were declared fraudulent, and the assignee thereupon proceeded to sell the lands as part of the estate of the insolvent, the present plaintiff attending at and forbidding the sale. At this sale the defendant became the purchaser, and the proceeds of this sale, together with the other assets of the insolvent estate, were distributed by the assignee, and the plaintiff, being also a creditor of the insolvent, accepted a dividend in common with the other creditors.

Held, that by so accepting the dividend, the plaintiff was estopped from impeaching the sale by the assignee. *Beemer v. Oliver et al.*, 523

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Bill of exchange—Special endorsement—Special indorser suing as holder without reindorsement.*]—The possession of bills of exchange by the indorser, after he has specially indorsed them, is *prima facie* evidence that he is the owner of them, and that they have been returned to him, and taken up in due course of time upon their dishonour, although there be no reindorsement; so that by the possession he is remitted to his original rights.

In July, 1877, W. drew a bill of exchange on the defendants, payable to his own order, and the latter accepted it. The bill was first specially indorsed to the Bank of O., which specially indorsed it for collection, to the Bank of C. It was dishonoured and protested, and came again into the hands of the Bank of O., which returned it to W. on or before December, 1877. Afterwards, but how did not appear, it got back into the hands of the Bank of O. In 1881 the plaintiff, who was W.'s agent, got it from the Bank of O., along with other papers of W., and W., in November, 1881, indorsed it to the order of the plaintiff, who now sued the acceptors. When produced the bill appeared with all the special indorsements struck out, leaving only the signature of W., to the first special indorsement, and with the last indorsement to the order of the plaintiff. There was no reindorsement from the Bank of O. to W. or to the plaintiff.

Held, (reversing the decision of *FERGUSON, J.*, who had nonsuited the plaintiff,) that in the absence of other evidence it was to be inferred that *W.*, had satisfied any claim of the Bank of O., and had thereby procured or had the right to make the cancellation of previous special indorsements.

Callow v. Lawrence, 3 M. & S. 95, cited and followed. *Black v. Strickland et al.*, 217.

2. *Promissory note — Repeal of Stamp Act—Pleading—Amendment.*]

— In an action on a promissory note, which at its making was not stamped, but had been double stamped before action, and after the repeal of the Stamp Act by the 45 Vic. ch. 1 D., the defendant denied the making of the note. At the trial, *Wilson, C.*

, refused leave to plead insufficient stamping on account of the repeal of the Stamp Act, but the plaintiff was allowed to amend by adding allegations showing the consideration for the note, and gave judgment for the plaintiff.

Held, that the judgment was right.

Per HAGARTY, C. J.—The learned Judge was not bound to allow a plea of insufficient stamping to be added by way of amendment, under the circumstances.

Per ARMOUR and CAMERON, JJ.—The amendment should have been allowed.

Per ARMOUR, J.—The note even if unstamped or insufficiently stamped was admissible in evidence of the debt to the plaintiff, the Stamp Act not prohibiting such a use of it, and *McKay v. Grinley*, 30 U. C. R. contra, should not be followed.

Per HAGARTY, C.J., and CAMERON, J.—It is necessary, at all events since the Judicature Act, to plead specially want of stamps.

Per CAMERON J.—The unstamped note was in its inception valid, but became invalid by neglect to stamp it. The repeal of the Stamp Act leaves the law where it was before those Acts were passed, and the note being originally a valid transaction is valid. *Caughill v. Clarke*, 269.

3. *Promissory notes — Restricted negotiability—Mutilation—Negligence — Innocent holders.*—*D.* gave *C.* two promissory notes, payable to *C.* or bearer, but having indorsed on them contemporaneously with their making, and in the case of one of them on the edge of the paper, the words “the within notes not to be sold,” which indorsement the evidence shewed formed part of the contract between the parties. The notes were transferred to *S.*, with the word “not” in the above indorsement, in the case of one of them, erased, and the whole of the said indorsement, in the case of the other, in which it was written along the edge, torn off, but without destroying any part of the face of the note.

Held, that whether the words of the above indorsement were underwritten or indorsed was immaterial, they being part of the original contract, and the effect of it was to prevent *C.* disposing of the notes to a holder for value, so as to preserve to the makers all defences and equities, as against the first holder and volunteers under him, thus qualifying their negotiability.

Held, also, the notes having been altered in a material part, *D.* was discharged, and *S.* could not be protected on the ground of any negligence on *D.*'s part in respect to the note in which the indorsement was written along the edge of the paper, inasmuch as the notes were issued in a perfected shape, and the doctrine

of negligence does not apply to such perfected instruments.

It appeared that S. was a private banker: that he had been informed before taking the notes that they were given in purchase of patent rights. that he noticed the erasure in the one of them first purchased, and that he paid much less than the commercial value of them, while they both bore marks of infirmity, and indeed of knavery.

Held, S. could not be considered an innocent holder of the notes. *Swaissland v. Davidson et al*, 320.

BILLS OF SALE AND CHATTEL MORTGAGES.

1. *Redemise Clause*.]—The chattel mortgage contained no redemise clause, but did contain a clause that the mortgagee might take the goods if the mortgagor attempted to sell, dispose of, or part with the possession of the goods.

Held, that the mortgagee had the right, under the circumstances, to take the goods, although default in payment had not been made. *Whimsell v. Gifford et al.*, 1.

2. *Description of goods—Waiver—Execution—Sheriff*.]—The goods and chattels were described in a chattel mortgage as follows:—Certain specific articles were first enumerated in the mortgage, and the description then proceeded, “also the stock of gold and silver watches, jewellery, and electro-silver plate, which, at the date hereof, is in the possession of the mortgagor in his said store,” (being a certain store of the mortgagor thereinbefore specified). The evidence shewed the electro plate goods and watches were numbered.

and might have been identified thereby.

Held, a sufficient description of the goods mortgaged.

Where a sheriff seizes goods under writs of execution, and a mortgagee lays claim to them under a chattel mortgage, the fact that he subsequently directs the sheriff to sell under the executions, does not necessarily amount to a waiver of his claim under the mortgage. *Segsworth v. Meriden Silver Plating Co.*, 413.

3. *Chattel mortgage—Action for seizure and sale under—Collateral security—Principal and surety—Premature sale*.]—H., in consideration of his relieving C. from executions against him, procured from C. and his wife, the plaintiff, a promissory note for the amount thereof, and also a chattel mortgage on the goods of both as collateral security. He discounted the note at a bank, and with the proceeds paid off the executions. Afterwards, but before the maturity of the note, and while it was in the bank's hands, claiming that there was a breach of mortgage by the removal of certain goods which was disproved, and refusing to allow the mortgagors to redeem, he took the goods thereunder, and sold them, selling goods, beyond the amount required to satisfy the mortgage, including the plaintiff's own goods to the amount of \$137.50.

In an action by the plaintiff to recover the damage thereby sustained the jury gave \$275.

Held, that the plaintiff was entitled to recover. 1. The note being the principal security, and the chattel mortgage merely collateral, H. could not proceed on the mortgage while the note was thus outstanding. 2. The sale was illegal by reason of the refusal of redemption. 3. Even if the

sale was merely irregular in selling for a supposed breach, the plaintiff was entitled to recover the value of the excess of the goods sold, and other damages beyond nominal for her interest in the goods ; and the verdict was held not excessive.

A removal of goods to justify a seizure under a chattel mortgage must be by the mortgagors or on their behalf, and not a wrongful removal by others *Cochrane v. Bowcher et al.*, 462.

BUILDING CONTRACT.

See WORK AND LABOUR.

BUILDING SOCIETIES.

See FRAUD AND MISREPRESENTATION.

BY-LAW.

As to cows and pigs, reasonableness of.]—*See* MUNICIPAL CORPORATIONS.

CANADA TEMPERANCE ACT.

Information—New offence—Amendment—Waiver of summons.]—*See* CONVICTION.

CARRIERS.

Right to warehouse goods.]—*See* RAILWAYS AND RAILWAY COMPANIES, 1.

CHARITABLE BEQUESTS.

See WILL, 2.

CHATTELS.

1. *Description of, in Mortgage.*]—*See* BANKRUPTCY AND INSOLVENCY, 2.

2. *Premature sale of*]—*See* BILLS OF SALE AND CHATTEL MORTGAGES, 3.

CLOUD ON TITLE.

Registry of Instrument not authorized by Registry Act.]—*See* REGISTRY LAWS, 1.

COLLATERAL SECURITY.

See BILLS OF SALE AND CHATTEL MORTGAGES, 3.

COMPROMISE.

See INSURANCE, 2.

COMPENSATION.

See RAILWAYS AND RAILWAY COMPANIES, 2.

COMPUTATION OF TIME.

See DIVISION COURTS, 1.

CONDITION IN POLICY.

See INSURANCE, 1.

CONDITION PRECEDENT.

See SPECIFIC PERFORMANCE — WORK AND LABOUR.

CONSTRUCTION.

See AGREEMENT.

CONTRACT.

See WORK AND LABOUR.

CONVICTION.

1. *Canada Temperance Act, 1878, —Information—New offence—Amendment—Waiver of summons.*]—An information was laid against the defendant on 28th December, for having on 25th December sold intoxicating liquor, in violation of the Canada Temperance Act, 1878. Upon a search being made, intoxicating liquor was found on the premises on 1st January, 1883, in the bar of the hotel. On this evidence, the information was amended, at the hearing, on the 5th January, 1883, so as to charge the keeping and not the selling. The defendant was present at the amendment and objected to it, but waived an adjournment, and entered upon his defence. The magistrate having found the defendant guilty, drew up a conviction for keeping intoxicating liquor, which was returned to the Clerk of the Peace, and filed on 17th January, 1883. On the 27th January, 1883, he drew up a second conviction, the same in all respects as the first, with the exception that it was for keeping for sale intoxicating liquor. This was also returned and filed.

Held, that he had power to draw up and return the second conviction, which was warranted by the evidence set out in the case.

Held, also, that there was no variance between the evidence and the information to warrant an amend-

ment, but that the evidence disclosed a new offence, and the amended information became in fact a new one. and the defendant, by his presence and by entering on his defence, had waived the service of a summons upon him.

Held, also, that it was no objection to the conviction that it was for keeping and selling, while the information charged the keeping only. *Regina v. Bennett*, 45.

2. *For assault.*]—*See* JUSTICES OF THE PEACE.

CORPORATE SEAL.

Of bank, necessity for.]—*See* PRINCIPAL AND AGENT.

CORPORATIONS.

1. *Bank.*]—*See* PRINCIPAL AND AGENT.

2. *Right of way.*]—*See* FRAUD AND MISREPRESENTATION — MUNICIPAL CORPORATIONS — RAILWAYS AND RAILWAY COMPANIES, 2, 4.

COSTS.

1. *Of failure as to part of goods claimed.*]—*See* INTERPLEADER.

2. *Of partially successful demurrer.*]—*See* PLEADING, 2.—COUNTY ATTORNEY—SPECIFIC PERFORMANCE, 1.

COUNTER CLAIM.

For damages.]—*See* DAMAGES 1. —INSURANCE, 2.

COUNTY ATTORNEY.

Fees—Disallowance by Provincial Treasurer and Board of Audit—Mandamus.—Under an Order in Council the County Attorney is entitled to \$4 on receiving and examining all informations, &c., connected with criminal charges for the Court of Assize, &c., upon the certificate of the Crown counsel that such fee should be allowed.

One C. on being brought before the County Judge on twenty-five charges of larceny, having elected to be tried by a jury, was tried at the ensuing Assizes and convicted on three of them ; but the remaining twenty-two cases were not tried. The plaintiff, a county attorney, obtained the Crown counsel's certificate for and charged a fee of \$4 in each of the above twenty-five cases, which was passed by the Board of Audit, and paid by the County Treasurer, but upon the twenty-two untried cases being disallowed by the Provincial Treasurer and his decision communicated to the Board of Audit, they deducted the amount from a subsequent account.

Held, that a mandamus would not lie to the Board of Audit to rescind their order, the ruling of the Provincial Treasurer being a good reason for their deducting the amount, which was a matter for their discretion under the R. S. O. ch. 85.

A fee of fifty cents is allowed to the County Attorney for attendance in the County Judge's Criminal Courts, and making the necessary entries for each prisoner not consenting to be tried summararily. The plaintiff charged fifty cents for actual attendance and making the necessary entries in each of the twenty-five charges preferred against C., which was separately read over to him and

his election taken thereon. The three cases on which the prisoner was actually tried were only allowed by the Board of Audit, on the ruling of the Provincial Treasurer.

Held, that for the same reasons as above a mandamus would not lie to the Board of Audit to allow the fee in the other cases.

The plaintiff claimed \$1 for an affidavit verifying the jurors' book, and \$1 for a certificate drawn up by him for the County Judge to sign, of the receipt of such books, &c. The tariff allows \$1 "for each certificate required to be entered in the jurors' book to verify the same."

Held, that these fees could not be allowed, and that a mandamus would not lie.

Remarks as to the unnecessary introduction of personal charges and assertions of motives in resisting the application, and costs refused in dismissing it. *In re Stanton and the Board of Audit, of the County of Elgin*, 86.

COUNTY COURTS.

Deputy Judge—Presumption of validity of appointment—R. S. O. ch. 42—Absence from county.—The defendant was convicted of perjury alleged to have been committed in a cause tried at a Division Court held by one H. under a commission issued by the Governor-General in Council appointing him Deputy Judge of the County Court of the county of Victoria, during pleasure and the absence of the County Judge under the leave of absence granted to him by an Order in Council.

Held, it was not necessary for the Crown to prove the Order in Council granting the leave of absence, for its

existence, and that the commission was not effete by the lapse of time would be presumed, in accordance with the general presumption of law that a person acting in a public capacity was duly appointed and authorized to act, the *onus* of shewing the contrary being on the defendant.

Held, also, that the commission was validly issued under R. S. O. ch. 42, and that it was not essential to enable the Deputy Judge to act, that the County Judge should be absent from the county. *Regina v. Fee*, 107.

COVENANT FOR TITLE.

See FRAUD AND MISREPRESENTATION.

COWS AND PIGS.

By-law as to.—See MUNICIPAL CORPORATIONS, 1.

CRIMINAL LAW.

1. *Gambling—Summary trial—Substitution of different offence at trial—Consent to trial on substituted offence—Sentence.*—The plaintiffs in error were charged with having defrauded one C. by a game called three card monte. They consented to be summarily tried. When brought up for trial the Crown Attorney asked for and obtained leave to substitute a charge of combining to obtain money by false pretences, the prisoners objecting. The trial proceeded without the consent of the prisoners obtained to be tried summarily for this offence. They were convicted and sentenced to one year's imprisonment.

Held, on error, that their consent to be summarily tried on the substi-

tuted charge should appear, and that in its absence the conviction was bad.

Held, also, that it was bad in adjudging the sentence of one year, the Act, 40 Vic. ch. 32, D., only authorizing a sentence for any term less than a year. *Goodman et al. v. Regina*, 18.

2. *Criminal law—Indictment—Pleading—Omission of “feloniously.”*—In an indictment purporting to be under 32, & 33 Vic. ch. 22, sec. 45, D., for malicious injury to property, the word “feloniously” was omitted.

Held, bad, and ordered to be quashed. *Regina v. Gough*, 402.

See EXTRADITION.

DAMAGES.

1. *Contract for sale of timber—Non-delivery—Loss of profits—Measure of damages.*—The plaintiff contracted to deliver timber to the defendant at St. Ignace, to be transported by him to Quebec for sale there. There was no market nearer to the place of delivery than Quebec. The plaintiff made default and in an action for the price the defendant counter-claimed for damages for non-delivery of the timber.

Held, CAMERON, J., dissenting, (reversing the judgment of BURTON, J.) A., that the measure of damages was the value of the timber at Quebec, less the cost of transportation thereto from the point of delivery.

Per BURTON, J. A., and CAMERON, J.—Loss of profits could not be recovered, and as the contract price for such timber had not varied, and there was no evidence of any contract by defendant to re-sell, which could be taken into consideration, or of any

purchase by him to supply its place, there was no right to more than nominal damages. *Hendrie v. Neelon*, 603.

2. *For registration of instrument not authorized by Registry Act.*—See REGISTRY LAWS, 1.

3. *See* BILLS OF SALE AND CHATTEL MORTGAGES, 3.

DEFAMATION.

Libel and slander—Public newspaper—Justification—Public benefit—Demurrer.—To a statement of claim, charging the defendants with the publishing of the plaintiff in their newspaper that he had seduced and betrayed one B. P., and was a man unfit for society of respectable people, &c., whereby the plaintiff was injured in his credit, &c., the defendants pleaded that the article was published *bonâ fide* and without malice, and for the public benefit, and in the usual course of the defendants' duty as public journalists, and was a correct, fair, and honest report of proceedings of public interest and concern.

Held, on demurrer, bad, for the publication complained of was in no sense for the public benefit, nor published in the course of defendants' duty. *Farmer v. Hamilton Tribune Printing and Publishing Co. et al.*, 538.

DEMURRER.

See PLEADING, 2.

DEPUTY JUDGE.

Proof of commission to.—See COUNTY COURTS.

DEVISE.

1. *Uncertainty in.*—See WILL, 2.
2. *To attesting witness.*—See WILL, 3.

DISCOVERY.

See EVIDENCE, 1.

DISTRESS.

1. *Distress for rent—Chattel mortgage—Waiver by tenant of formalities.*—The plaintiff was mortgagee of certain goods of one F. G., a tenant of his father, the defendant C. G. The landlord on the 17th February, 1883, went to the house of the tenant, and declared that he seized everything for rent. He touched nothing and made no inventory. On 24th February he went again and told the tenant's wife that the property had been seized for rent, and to let no one take anything away, when she promised to do her best for him. On 5th March the plaintiff hearing that the goods were going to be seized for rent, took possession under his mortgage and removed the goods. A bailiff went the next day for taxes in arrear, and the landlord gave him a distress warrant to take goods for rent. The bailiff then took the goods which had been removed, and on the tenants waiving an inventory, advertising, &c., sold them within two days to a nephew of the landlord.

Held, that the landlord's two visits of 17th and 24th February did not amount to a distress.

Quære, whether a tenant can waive all statutable formalities as to inventory, &c., as regards the mortgagee. *Whimsell v. Giffard et al.*, 1.

2. *Power to second mortgagee to pay arrears on first mortgage and distrain.*]—See MORTGAGE, 1.

DIVIDEND.

Effect of accepting.]—See BANKRUPTCY AND INSOLVENCY, 4.

DIVISIONAL COURT.

Power of to review action of a Judge.]—See ARREST.

DIVISION COURTS.

1. *Division Courts Act, R. S. O. ch. 47, sec. 231*—*Notice of action—Personal service—Computation of time.*]—Sec. 231 of the Division Courts Act, R. S. O. ch. 47, enacts that any action or prosecution against any person for any thing done in pursuance of the Act shall be commenced within six months after the fact was committed, &c, and notice in writing of such action and of the cause thereof, shall be given to the defendant one month at least before the commencement of the action.

Held, (1) that personal service was not required, but that service on the wife at the defendant's residence was sufficient: (2) that the Court in which the action is to be brought need not be stated in the notice; but even if required, *semble*, that the statement in the notice that the action would be brought in the High Court of Justice, without naming the particular Division, was sufficient: (3) that in computing the time in which the action must be brought the day on which the fact was committed must be excluded, so that an action commenced on the 5th

June, for an act committed on the 5th December, was in time. *Hanns v. Johnston*, 100.

2. *Special agreement with Clerk—discharged sureties.*]—See PRINCIPAL AND SURETY, 1.

DIVORCE.

1. *Foreign divorce—Husband's domicile that of the wife.*]—See HUSBAND AND WIFE, 1.

2. *Effect of claim for alimony.*]—See HUSBAND AND WIFE, 3.

DOMICIL.

1. *Of husband is that of wife.*]—See HUSBAND AND WIFE, 1.

2. *In case of foreign divorce.*]—See HUSBAND AND WIFE, 3.

DOWER.

1. *Dower—Quarantine—Right to companion and attendant—Evidence—Trespas.*]—*Held*, that the right of a dowress to occupy the mansion house during her days of quarantine is not merely a personal right, but that she is entitled to have reasonable and proper attendance and companionship, and an action will therefore lie for the eviction of such companion or attendant. *Lucas v. Knox*, 453.

2. *As separate estate.*]—See HUSBAND AND WIFE, 2.

3. *Lease by dowress.*]—See LANDLORD AND TENANT.

4. *Possession of dowress.*]—See
LIMITATION OF ACTIONS AND SUITS.

DRAINAGE.

1. *Public drainage Work—Overflow—Damages.*]—See WATER AND WATERCOURSES, 1.

2. *Municipal corporation—Drainage by-law—Misappropriation of moneys assessed—Injunction—Parties.*]—See WATER AND WATERCOURSES, 2.

EQUITY OF REDEMPTION.

See MORTGAGE, 2.

ERROR.

Summary trial—Substitution of different offence at trial—Consent to trial on substituted offence—Sentence.]—See CRIMINAL LAW, 1.

ESTOPPEL.

1. *Effect of accepting dividend in Insolvency.*]—See BANKRUPTCY AND INSOLVENCY, 4.

2. *Lease by dowress—Purchase by tenant from heirs-at-law—Right to dispute landlord's title—Statute of Limitations.*]—See LANDLORD AND TENANT.

3. See MORTGAGE, 3—PARTNERSHIP, 1.

EXECUTION.

See MORTGAGE, 2—WAIVER, 1.

EVIDENCE.

1. *Sale of medicinal composition—Representation as to curative properties—Discovery of ingredients.*]—In an action on a promissory note given by the defendant to the plaintiffs in payment of a quantity of pads made by the plaintiffs, and said to possess curative properties when applied to the body, the defence was, that the note was obtained by fraud and that the pads purchased were useless and possessed no healing properties. The defendant demanded production and discovery of the formula or recipe from which the pads were made, in order to show that they were valueless, which the plaintiffs refused on the ground that no representation was made as to their ingredients, that the composition was a secret not patented, and that discovery would injure them in their business.

Held, that the defendant was not entitled to the discovery. *Star Kidney Pad Co. et al. v. Greenwood*, 280.

2. *Presumption of validity of appointment of Deputy Judge.*]—See COUNTY COURTS.

3. *Presumption of ownership.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

4. *Effect of words “without prejudice.”*]—See AGREEMENT.

5. *Solicitor's correspondence and requisitions of title not admissible.*]—See SPECIFIC PERFORMANCE, 3.

See PRINCIPAL AND SURETY, 1.

EXECUTORS AND ADMINISTRATORS.

1. *Foreign administration—Right of creditor and next of kin—Private international law—Removal of proceedings from the Surrogate Court to this Court—Peremptory writ—The Surrogate Court Act—R. S. O. ch. 46, secs. 32, 36.*]—One D. dying domiciled abroad, R., a creditor of her estate, obtained letters of administration there. Subsequently S., as appointee of R., and with his consent, applied here for letters of administration to be granted to him by the Surrogate Court. E., however, residing at Toronto, and as next of kin to B., also applied here for administration to B.'s estate, S. now applied to have the matter transferred into this Court, or for a writ of prohibition to the Surrogate Judge preventing him granting letters to E., and a mandamus ordering him to grant them to S.

Held, failing any proof as to the law in Maine, it must be assumed to agree with the law here, according to which the Court will not grant administration to a creditor, so long as one having a better claim, as is the case with the next of kin, is willing to act; and, inasmuch as the next of kin did not appear to have been cited before the Court in Maine, the *status* of the creditor who obtained administration there, or of his appointee, was not such as to compel the Surrogate Judge here to pass over the next of kin.

The appointment of a creditor as administrator is not as of right, but rests in the discretion of the Judge who appoints, and that cannot be interfered with by any peremptory writ; and R. S. O. ch. 46, secs. 32, 36 do not better the claim of a creditor.

Browne v. Phillips, Ambl. 416, followed.

Re Hill, L. R. 2 P. & D. 89, distinguished. *Re O'Brien*, 326.

2. *Power of executor to sell.*]—See WILL—LIMITATIONS, STATUTE OF, 1.

EXTRADITION.

Extradition—Ashburton Treaty—Forgery.]—The prisoner was a clerk in the office of the comptroller of the city of Newark, New Jersey, U. S. A., his duty to make proper entries of moneys received for taxes in the official books of the comptroller provided for that purpose. Having received a sum of money for taxes, he entered the correct amount at first, and then erasing the true figures he inserted a less sum, with intent to benefit himself by the abstraction of the difference between the two, and to deceive the comptroller and the municipality.

Held, that the offence was forgery, and that the prisoner had been properly committed for extradition.

It is not necessary to constitute the crime of forgery that another's right shall have been actually prejudiced, the possibility of prejudice to another is sufficient; and if publication be necessary, the books in question being of a public character, the forged entry in them must be regarded as having been published as soon as made.

Semble, per PROUDFOOT, J.—It is not necessary for purposes of extradition that the crime charged should have been such an act as would have constituted that crime at the date of the Ashburton Treaty. It is sufficient if it constituted the crime in question at the date of its alleged commission. *In re William A. Hall*, 331.

FEES.

See COUNTY ATTORNEY.

FIXTURES.

Mortgagor and Mortgagee. [Chattels.]—Certain counters were embraced in the contract for the carpenter's work of a drug store, and nailed to a scantling, which was placed in the wall of the store. The bottom or ledge of the counters was made fast to the floor of the store, and the end connected with the framework of the windows in such a way that the wainscotting at the bottom of the windows would be materially injured by taking them (the counters) out, and the floor of the building also would be considerably damaged.

Held, that the counters were part of the freehold and included in a mortgage thereof, and not chattel property.

Holland v. Hodgson, L. R. 7 C. P. 328, and *Keefer v. Merrill*, 6 A. R. 121, approved of. *McCausland v. McCallum, et al.*, 305.

FOREIGN LAW.

1. *As to administration.*] See EXECUTORS AND ADMINISTRATORS, 1.

2. *As to Divorce.*] See HUSBAND AND WIFE, 1, 3.

FORGERY.

See EXTRADITION.

FRAUD.

See BANKRUPTCY AND INSOLVENCY, 2, 3.

FRAUDS, STATUTE OF.

See SPECIFIC PERFORMANCE, 3.

FRAUDULENT CONVEY-
ANCE.

See PLEADING, 1.

FRAUDULENT PREFERENCE.

See BANKRUPTCY AND INSOLVENCY, 1, 2, 3.

FRAUD AND MISREPRESENTATION.

1. *Sale of securities for lump sum—Deficiency in value—Misrepresentation—Notice to solicitor—Sale for taxes—Covenant—Arrears of taxes—Costs.*]—The plaintiffs negotiated for the purchase from the defendants of certain mortgage securities and other assets of the defendants on a basis of an eight per cent. investment, and a schedule was prepared by the defendants manager exhibiting each security, amongst which there was stated to be a mortgage by F. for \$4,700; whereas in fact there was no such mortgage, but instead, two mortgages on the instalment principle, which as an eight per cent. investment were worth only \$3,920, making a deficiency of \$780. This was caused by F. before the schedule was drawn up, intimating his intention of paying off the mortgages, \$4,700, being the amount agreed upon between F. and defendants, which he would have to pay and which defendants' manager therefore, in good faith, put into the schedule. Subsequently, and while the schedule was in the plaintiffs' solicitor's hands

to prepare and settle the deed of assignment, F. decided not to pay off the mortgages, but to go on with the regular payment of the same, and defendants' manager then corrected the schedule by inserting the two mortgages. There was a difference between the plaintiffs and defendants as to the value of the securities, and finally a lump sum was agreed on and paid by plaintiffs, and the assignment executed.

Held, by OSLER, J., that, on the evidence set out in the case, the plaintiffs' solicitor must be deemed to have had notice of the error and alteration in the schedule before the execution of the conveyance or completion of the transaction, and that this was notice to the plaintiffs.

Semble, per OSLER, J., that, although the evidence shewed that there was no intention to deceive on the part of the defendants' manager, still there was such a misstatement of a material fact as but for the notice would render the defendants liable for the damage sustained thereby.

The defendants in the deed of assignment covenanted that the mortgages were good and valid charges on the lands, and that the defendants had not done or permitted any act, &c., whereby the mortgages had become released or discharged in part or in entirety. It appeared that certain of the lands comprised in these mortgages had been sold for taxes.

Held, per OSLER, J., that the covenant was not *ultra vires* of the company or the directors; and that the plaintiffs were entitled thereunder to recover the value of the lands so sold.

Arrears of taxes due on the mortgaged lands were paid by the plaintiffs. The taxes were due by the mortgagors; there was no covenant

in the assignment against incumbrances, and no evidence of any request by defendants to pay them.

Held, that the plaintiffs were not entitled to recover the amounts so paid.

The plaintiffs also claimed to recover a sum of money paid to the defendants' solicitors for costs due them; *Held*, under the circumstances not recoverable, as it was a voluntary payment.

On appeal to the Divisional Court: *Held*, as to the claim for the \$780, there could be no recovery, for that the true construction of the transaction was that the lump sum was to cover all deficiencies in value as also errors and mistakes, at all events to not an unreasonable amount, which \$780 could not be said to be; and where, as here, there was no fraud, concealment, or misrepresentation.

In other respects the judgment was affirmed. *The Real Estate Investment Co. v. The Metropolitan Building Society*, 476.

2. *Partner relieved on account of.*
See PARTNERSHIP, 1.

GUARANTEE.

See PRINCIPAL AND AGENT.

HIGHWAYS.

See WAYS.

HUSBAND AND WIFE.

1. *Foreign divorce—International comity—Domicil.*—Where one obtained a divorce from his wife in a foreign state, in which he was *bonâ fide* domiciled, by proceedings of

which notice was served personally on the wife living here, which were not collusive, nor contrary to natural justice, and for adultery on the wife's part.

Held, that entire credit must be given to the foreign divorce in this Province, although the wife at the time of the divorce proceedings resided here, for the domicile of the husband was the domicile of the wife, and the validity of the divorce depended on the law of the domicile of the parties *Guest v. Guest*, 344.

2. *Married woman—Separate estate—Right to dower—Judgment.*]

In an action against a married woman, married in 1871, on a promissory note made by her, the only property she was proved to have was a right to dower in certain land owned by a former husband. Judgment was entered for the plaintiff for the amount of his claim, with a direction for the recovery of same out of the separate property then and at the date of the making of the note vested in defendant, or in any person in trust for her, with which amount such separate estate was charged. *Wallace v. Hutchison*, 398.

3. *Alimony—Marriage—Foreign divorce—Domicil.*—Where, in an action for alimony, it appeared that the defendant had, previously to action brought, obtained a divorce from the plaintiff in M., one of the United States of America, and for that purpose had resided a sufficient period of time in M. to comply with the local law governing divorce, yet that his *bona fide* domicile, both at the time of his marriage with the plaintiff, which also took place in the United States, and at the time of the said divorce, was Canadian :

Held, that the divorce did not operate in this Province, so as to bar the plaintiff's claim for alimony.

The marriage relation cannot be properly regarded as one of mere contract, for the rights, duties, and obligations arising from it are not left entirely to be regulated by the agreements of the parties, but are to a certain extent matters of municipal regulation, and as to them the law of the domicile must be looked to. *Magurn v. Magurn*, 570.

ICE.

See WAYS.

INDICTMENT.

Omission of word "feloniously."]
See CRIMINAL LAW, 2.

INSURANCE.

1. *Encumbrances—Misrepresentation—Divisible condition*]—A fire policy contained a condition, in addition to the statutable conditions, to the effect that if the property were alienated, or any transfer or change of title occurred, or if it were incumbered by mortgage, without the consent of the company, or if the property should be levied upon under process of law, the policy should cease. In answer to the question whether the property was mortgaged, the assured answered "\$5,000 to F. L. & S. Co." There were at the time, in fact, two mortgages to that company, on which \$6,160 were due. After the policy a mortgage was given to secure endorsements; and was discharged, and another was given by the plaintiff to his partners who retired from

the firm, but the company was not apprised of either. The jury found that the representations as to incumbrances were false, but not made fraudulently, and a verdict was entered for the defendants.

Held, that the representation as to incumbrances was a violation of the condition, and that the verdict was right.

Per HAGARTY, C. J. Though that part of the condition as to levying might be unreasonable (5 A.R. 605), the remainder was not, and the condition was divisible. *Wilby v. Standard Ins. Co.*, 115.

2. *Mortgage — Subrogation — Statutory conditions 1 and 8 — Company — Misrepresentation — Power of manager to compromise claim — Notice to subordinate clerk — Policy effected by agent — Non-disclosure of prior mortgages and incumbrances — Counter-claim in mortgage action — Practice — R. S. O. ch. 162.*

—On Feb. 21st 1879, A. B. & Co., the plaintiff's, gave a mortgage on a mill property covenanting to insure, which they did in the R. company, by policy dated March 19, 1879, expiring March 1, 1880. On March 10th, 1879, A. left the firm. On March 1st, 1880, the mortgagees, having received no renewal receipt of the above policy, insured the property in the U. company in the name of the plaintiffs. This U. policy provided that the loss should be payable to the mortgagees, and the insurance as to the interest of the latter should not be invalidated by any act of the mortgagors, and that if the mortgagors did any act invalidating the policy, and the insurers should pay the amount of the policy to the mortgagees, they should be subrogated to the rights of the latter, or might pay the whole of the mort-

gage debt, and obtain an assignment of the mortgage. There was no written application for the U. policy. The R. policy was simply handed to the insurers, and from it they drew their policy, which had the statutory conditions only. No representations were made to them in any other way. The premium was paid by the mortgagees, who collected it from the plaintiffs, the latter having taken no part in effecting the insurance. On March 14th, 1881, the mortgagees wrote a letter to the plaintiffs, in which they represented the U. policy as indisputable. A fire having occurred the U. company paid the mortgagees the amount of the loss, which more than covered the amount due on mortgage, of which they took an assignment. The evidence showed that at the time of effecting this policy there were certain insurances on the property, and also certain mortgages, of which the U. company were not informed and to which they never assented. The plaintiffs now, suing on the U. policy claimed to have the mortgage discharged and the balance of the insurance money paid to them, and the U. company counterclaimed for the amount due on the mortgage:

Held, (reversing the decision of Ferguson, J.,) that the non-communication of A.'s retirement from the firm was not a breach of statutory condition No. 1, because A, though he had retired, retained an insurable interest, both as liable on the covenants in the mortgage, and as still retaining the right to redeem the mortgage; and, moreover, even if A. had no interest at all, the surviving partners could recover according to the extent of their interest.

Seem, even if notice of the change had been of moment, yet since the evidence showed that the matter of

the policy, as between the mortgagees and the U. company, was left to the under-clerks to deal with, and that a clerk of the mortgagees informed a clerk of the U. company of the change in question, a jury might properly find that notice of the change was communicated to the U. company.

Held, further that the non-communication of other mortgages, subsequent to that to the plaintiffs, was not a breach of statutory condition No. 1, because such non-communication will not, apart from stipulation, irrespective of the nature and amount of the other mortgages and without any imputation of fraud, avoid a policy; and also because the plaintiffs were not bound unasked to state the exact nature and extent of the interest to be insured, and there was at least contributory negligence on the part of the insurers, who might be regarded as having waived information as to the mortgages.

Samo v. Gore District Mutual Insurance Co., 1 A. R. 545, followed.

Held, further that the fact of there being two prior insurances unassented to was not a breach of statutory condition No. 8, because the evidence showed the U. policy was to take the place of the R. policy, and of the prior insurances one was assented to on the face of the R. policy and the other had been taken in substitution for another, which also appeared an assented to on the R. policy. It was the duty of the U. company to have properly issued there policy, agreeing to take the position of the R. company, as also it was the duty of the mortgagees to see the policy properly issued.

Held, further, that the letter of March 14, 1881, contained representations which the mortgagees were bound to make good, especially as

the U. company acted as agents for the plaintiffs in effecting the policy.

Held, further, that the claim of the U. company to foreclose could not be entertained, for the U. company could not take advantage of their own default in not making the formal entry of assent to the prior insurance on their policy to bring it into play the subrogation clause for their own advantage.

Springfield Fire Insurance Co. v. Allen, 43 N. Y. 387 distinguished.

Held, lastly, on the whole case, it should be declared that the mortgage had been paid, and the proper discharge should be executed, and the mortgagees should pay the balance of the insurance money to the plaintiffs, with interest, with costs of suit to the plaintiffs as against both defendants but without prejudice to the defendants litigating their respective liabilities as between themselves.

Quære, also, whether upon the facts stated below the plaintiffs were not entitled to recover on the ground of a compromise made between the parties.

Held, per FERGUSON, J., O. J. A. Rule 17, and G. O. Chy. 647 do not apply to counter-claims. *Klein et al. v. The Union Fire Ins. Co. et al* 234.

INTERNATIONAL LAW.

As to administration.]—See EXECUTORS AND ADMINISTRATORS, 1.

INTERPLEADER.

Costs when issue successful in part only.]—Where a mortgagee claimed all the goods seized by a sheriff under execution, but it appeared on the trial of an interpleader issue between the mortgagee and the

execution creditors that some of the goods seized amounting to one-sixth of total value were not covered by the mortgage.

Semble, although the mortgagee was entitled to the general costs of the issue, a deduction of one-sixth should be made in respect of the goods as to which he failed. *Segsworth v. The Meriden Silver Plating Co.*, 413.

JUDGMENT.

Recovered, res judicata.] — See BANKS — BANKRUPTCY AND INSOLVENCY, 3.

JUSTICE OF THE PEACE.

Conviction — Assault — Stopping carriage by standing in front of horses.] — The defendants were convicted for unlawfully assaulting F.V. "by standing in front of the horses and carriage driven by the said V., in a hostile manner, and thereby forcibly detaining him, the said V., in the public highway against his will."

Held, that the conviction was bad in stating the detention as a conclusion and not as part of the charge, which, as shewn by the conviction, was merely standing in front of the horses, and did not amount to an assault. *Regina v. McElligot and Meyers*, 535.

See CONVICTION, 1.

LANDLORD AND TENANT.

Lease by Doweress — Purchase by tenant from heirs-at-law — Right to dispute landlord's title — Statute of Limitations — Estoppel.] — P., being the owner in fee of the land in ques-

tion, died intestate in September, 1853, leaving his wife, the present plaintiff, and two daughters, who resided on the land for a short time after his death. The widow made several leases of the land, and finally leased it to M., the defendant's devisor, who, at the expiration of his lease, took a second lease, with a covenant to deliver up at the end of the term.

He purchased the interest of one of the daughters, and a new lease was thereupon made to him by the plaintiff, the rent being reduced by one-third, because it was considered that the widow and daughters were each entitled to a third of the rents. Pending this lease the tenant purchased the other daughter's interest, and at the expiration of the term in 1873 he refused to give up possession, alleging that he owned the land, and that the plaintiff's right to dower was barred by lapse of time.

Held, affirming the judgment of CAMERON, J., that M., the tenant, having, while owner of one undivided half of the land, covenanted to give up possession to the plaintiff at the end of the term, and having got into possession under her, the defendants claiming under M., were estopped from disputing her right, and must restore possession to her before setting up an adverse title: that M., by accepting the lease at a reduction of one-third of the rent, on his purchase of the daughters' interest, had acquiesced in the plaintiff's claim as doweress, and was estopped from setting up the Statute of Limitations against her; and that she was entitled therefore to judgment for one third of the land for life, and to mesne profits since the expiration of the lease.

Patterson v. Smith, 42 U. C. R. 1, remarked upon. *Pyatt v. McKee et al.*, 151.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

1. *Charged on "Estate."*]—See WILL,

LIBEL AND SLADER.

See DEFAMATION.

LICENSES TO SELL LIQUOR.

See TAVERNS AND SHOPS.

LIEN.

1. *Mechanics' Lien Act—Registration of claim by assignee—Affidavit of verification—R. S. O. c.v. 120, sec. 4, sub-sec. 2*]—Where G. claimed, under the Mechanics' Lien Act, a lien in respect of materials furnished, by virtue of an assignment from the original furnisher thereof:

Held, G. had a right to register a claim for the same under the said Act, but the affidavit of verification required by sec. 4, sub-sec. 2, must be made by himself, and not by the assignor. *Grant v. Dunn et al.*, 376.

2. *Mechanics' lien — Priority—Res judicata—Parties—R. S. O. ch. 120.*]—Where B. gave a mortgage to W., and afterwards employed G. to do certain work and furnish materials on the property mortgaged.

Held, that G. was entitled, under R. S. O. ch. 120. sec. 7, to a lien for the amount owing for the said work and materials in priority over W.'s mortgages in respect of the increased value of the said property by reason of the said work and materials.

Held, also, that although W. had previously commenced proceedings under an alleged lien in respect of the said property against B., subsequently to the commencement of which proceedings the work was done in respect of which the present lien was now claimed, it was not necessary that G. should have been made a party to the former action, and the fact that G. was not included in the Master's report in that action, as among those holding liens against the property in question, was no bar to his maintaining this one.

Each lien under the Mechanics' Lien Act stands on its own footing, every lien-holder being entitled to security upon the enhanced value arising by reason of his work and materials. *Bank of Montreal et al. v. Hafner et al.*, 183.

LIMITATION OF ACTIONS AND SUITS.

Limitation of actions—Possession of doweress.]—C. R. died intestate in 1864, seized in fee simple of the land in question, leaving his widow and several heirs-at-law. The widow remained in possession from the time of his death until her own decease in 1881, and cultivated the farm. There was some evidence of her declarations that she kept possession with the consent of the heirs for them, claiming only her dower, but no evidence of a written acknowledgment of their title. She devised the land to the plaintiff.

Held, that the possession of the widow was not a possession *qua doweress* even of one-third of the land, and that the title of the heirs-at-law to the whole had been thereby barred. *Johnston v. Oliver et al.*, 26.

See RAILWAYS AND RAILWAY COMPANIES, 3.

LIMITATIONS, STATUTE OF.

1. *Executor—Statute of Limitations—Residue—Trustee and cestui que trust R. S. O. ch. 108, sec. 23.*—Where A., one or two residuary legatees and executors, left the collection of the outstanding assets of the deceased entirely to B., the other residuary legatee and executor, under an agreement between them, by which B. was to remit a moiety when a certain specified amount was collected, and it appeared that the residue was ascertained or could have been ascertained within a year from the testator's death :

Held, that A.'s claim to what was so collected more than ten years before action brought was barred by the Statute of Limitations, but as to what was got in by B. afterwards A. was entitled to recover.

Held, also, that the fact of the fund in B.'s hands having been from time to time drawn upon to make good deficiencies in the general legacies, so that the residue was not precisely and for all purposes ascertained, did not prevent the bar of the statute ; neither was there any fiduciary relationship between A. and B., such as to have that effect.

Quere, whether, if the money collected by B. could have been specifically traced and followed, the Court would allow this to be done. notwithstanding the lapse of ten years.

Held, lastly, that the bar of the statute applied not only to assets distributed by B., but also to assets retained by him. *Re Kirkpatrick, Kirkpatrick et al. v. Stevenson et al.* 361.

2. *Action for partnership account—Statute of Limitations—21 Jac. 1 ch. 16.*—Where in an action for a partnership account on a contract for work done on a canal, it appeared that the business had been closed, the books made up, a final estimate obtained, and the plant sold, more than six years before the commencement of the action.

Held, that the plaintiff was barred by the Statute of Limitations, and the fact that within the six years, a certain sum had been paid over to the plaintiff's solicitors, but without his knowledge, as the full amount of the partnership profits due to the plaintiff, could not operate to take the case out of the statute. *Cotton v. Mitchell et al.* 421.

See PLEADING, 2—LANDLORD AND TENANT—RAILWAYS AND RAILWAY COMPANIES, 3.—REGISTRY LAWS, 2—WILL, 3.

LIQUOR LICENSES.

See TAVERNS AND SHOPS.

MANDAMUS.

Municipal Corporation—Railway aid—Debentures—Mandamus.—*Held*, following the decision of the Supreme Court of Canada, *In re Grand Junction Railway v. Peterborough*, (not yet reported), that a writ of mandamus to compel the issue of debentures by a municipal corporation under a by-law in aid of a railway, will not be granted upon motion, but the applicant must bring his action. *In re The Canada Atlantic R. W. Co. and the Corporation of the Township of Cambridge*, 291.

See COUNTY ATTORNEY.

MECHANICS LIEN.

1. *Rights of assignees—Affidavit of verification.*—See LIEN, 1.

2. *Priority res judicata—Parties.*]
--See LIEN, 2.

MEMORANDA.

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MISREPRESENTATION.

See INSURANCE, 1.

MISTAKE.

Execution of a Mortgage under.]
—See PUBLIC SCHOOLS, 1.

MONEY COUNTS.

See FRAUD AND MISREPRESENTATION.

MORTMAIN.

See WILL, 2.

MORTGAGE.

1. *Power to second mortgagee to pay arrears on first mortgage and distrain—Purchase by second mortgagee under power in first mortgage—Distress*—The plaintiff mortgaged his land to the F. L. & S.'s Co. by a mortgage which contained a distress clause, and gave a second mortgage to the defendant, by which it was agreed between them that if default was made in payment of interest to the company the defendant should

be at liberty to pay it, and should have the same remedies for its recovery from the mortgagor that the company had. Default having been made the company exercised their power of sale, and the defendant became the purchaser. After signing a contract for the purchase he distrained the goods of the plaintiff for the interest that had fallen in arrear to the company. Shortly afterwards he obtained a formal conveyance of the land, expressed to be under the power of sale in the company's mortgage.

Held, that the plaintiff's estate having paid the mortgage debt to the company in full the defendant could not be said by means of his purchase thereof to have paid the interest in arrear so as to entitle him to distrain therefor. *Harron v. Yemen*, 126.

2 *Execution—Mortgage—Equity of redemption—R. S. O. ch. 66, secs. 27, 28.*—Where R. assigned a certain mortgage to M. to secure payment of two promissory notes of less amount than the mortgage debt, and M. having procured an assignment to himself of a certain judgment against R., the sheriff, pursuant to writs issued under the said judgment, seized the mortgage so assigned, and M. refused to execute a re-assignment thereof to R., until not only the amount due on the promissory notes, but also the balance due under the said mortgage was paid.

Held, that R. was entitled to a re-assignment on payment of what was due on the notes only, for the plaintiff's interest in the mortgage was not properly exigible by the sheriff under R. S. O. ch. 66.

Ross v. Simpson, 23 Gr. 552, distinguished. *Rumohr v. Marx*, 167.

3. *Registry—Notice—Mortgage—Notice of state of mortgage account—Wife joining to bar dower—Estoppel—R. S. O. ch. 111.*]—On April 4th, 1863, M. and his wife (to bar dower) mortgaged the lands in question to C. On May 21st, 1867, M., being in insolvent circumstances, conveyed the said lands to W. to the use of M.'s wife. In 1868, and 1872 M. executed two other mortgages to C. for the debt originally secured by the first mortgage. On December 20th, 1874, M., and his wife (to bar dower) mortgaged the said lands to G. All the above deeds were registered about the time of their respective executions. On March 6th, 1876, G. assigned to the plaintiff, but the deed was not registered. On June 7th, 1876, M. and his wife jointly mortgaged the same lands to the plaintiff by deed registered July 15th, 1876. On May 21st, 1874, W. and M. and his wife granted and released the said lands to C. until payment of the mortgage of 1872, and on payment thereof to the use of M. in fee. This, however, was not registered till August 4th, 1881. The plaintiff had no notice that the conveyance from M. of May 21st, 1867, was invalid, nor of the conveyance of May 21st, 1874, but he had notice of the three mortgages to C., and that C. claimed the whole debt against the land, and also that there was a defect in C.'s title under the second and third mortgages.

Held, that the plaintiff, being bound by such notice, could not avail himself of any defect in title arising from M. executing the latter two mortgages to C. although still being the owner of the equity of redemption, that the plaintiff acquired his title with knowledge that C. claimed a debt represented by the three

mortgages, and took his mortgage, subject to such claim by C.

Held, also, that the deed from M. of May 21st, 1867, was either voluntary or a fraudulent preference, and in either case void; and that the fact that M.'s wife joined to bar dower, in the two last mortgages to C. after she had apparently become the owner of the equity of redemption, constituted her a party to the accounting which took place with C. in respect to the continuing debt, and bound her in her character of assignee of the equity of redemption if she could be so considered. *Edwards v. Morrison et al*, 428.

4. *Removal of counters covered by.*] *See* FIXTURES.

5. *Assignment of, on receipt of insurance money for loss.*]—*See* INSURANCE, 2.

6. *Extent of priority of Mechanics' Lien over.*]—*See* LIEN, 2.

7. *Executed under a mistake.*]—*See* PUBLIC SCHOOLS, 1.

8. *Right to consolidate.*]—*See* REGISTRY LAWS, 2.

MUNICIPAL CORPORATIONS.

1. *Municipal by-law—Nuisances—Prohibition against keeping swine and cows—Validity of.*]—The defendants passed a by-law pursuant to R. S. O. ch. 174, sec. 466, sub-sec. 17, as amended by 44 Vic. ch. 24, sec. 12, which by-law, by sec. 2, provided that "No person shall keep, nor shall there be kept, within the city of Toronto any pig or swine or any piggery."

Held, that the by-law was *ultra vires*, as being a general prohibition

against the keeping of pigs, and not restricted to cases that might prove to be nuisances.

By sec. 3, sub-sec. 2, the by-law provided that no cow should be kept in any stable, &c., situate at a less distance than forty feet from the nearest dwelling house, and where two cows were kept that the stable should not be less than eighty feet from the nearest dwelling house.

Held, that it was unnecessary to declare expressly that the keeping of cows within such distances was or might be a nuisance, but that the prohibition was in effect such a declaration, that the distances prescribed were reasonable, and that the by-law as to that was unobjectionable.

Semble, that it was not bad in being so generally expressed that it would restrict the owner from keeping cows within the prescribed distances of his own dwelling house, and

Held, that this objection not being clear should not at any rate be allowed to prevail in favour of the applicant, whose case was not shewn to be within the terms of the objection. *McKnight v. The City of Toronto*, 284.

2. *Mandamus to compel issue of debentures by.*]—See MANDAMUS.

3. *Bond to.*]—See PUBLIC SCHOOLS, 1.

4. *Right of way.*]—See RAILWAYS AND RAILWAY COMPANIES, 4.

5. *Liquor license — Partner — Councillor.*]—See TAVERNS AND SHOPS.

6. *Drainage.*]—See WATERS AND WATERCOURSES, 1, 2.

NEGLIGENCE.

1. *In making note.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

2. *In train moving backwards.*]—See RAILWAYS AND RAILWAY COMPANIES, 5.

3. *Ice on sidewalk.*]—See WAYS.

NOTICE,

1. *Of alteration.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 3.

2. *Of State of mortgage account.*]—See MORTGAGE, 3.

NOTICE OF ACTION.

See DIVISION COURTS.

NUISANCES.

By-law as to.]—See MUNICIPAL CORPORATIONS, 1.

PARTNERSHIP.

1. *Co-partners—Pooling profits and losses—Agreement—Execution of deed—Election—Estoppel—Misrepresentation—Fraud—Indemnity—Failure of consideration.*]—Eight persons, who had previously been engaged in the cattle trade, held a meeting in the month of October, 1880, and passed a series of resolutions, prefaced by the declaration that they and four others, whose names were mentioned, proposed to form a cattle dealers' syndicate for the purpose of exporting cattle, to commence with the opening of navigation, from Portland.

The resolutions provided that each member of the syndicate should make a deposit of \$5,000 to the credit of the representative of each company :

That no member of "this firm" should do any business outside of the syndicate in export cattle except for the benefit "of the company."

That no member of the syndicate should appoint any person to buy cattle except approved of by the majority of the members :

That each member should take the position assigned him by the majority of the syndicate :

That the syndicate should be divided into two companies, each to consist of six members (whose names were mentioned) :

That no member should be admitted to the syndicate without the approval of all the members :

That none of the cattle space which was then taken should be sub-let without the approval of the syndicate.

That the profit or loss should be equally divided, share and share alike, between all the members of the syndicate :

All the contemplated members of the proposed syndicate except one signed the resolutions. One of the firms was already in existence, the other was to be thereafter formed. The one already existing comprised six members of the proposed syndicate, and was called Thompson & Co., the other subsequently formed was composed of five members of the proposed syndicate, and was called Craig & Co. These two firms proceeded to buy and export cattle ; each opened separate bank accounts. The firm of Craig & Co., dealt with the plaintiffs and obtained advances. From the evidence it appeared that the plaintiffs had knowledge of the

resolutions above referred to, but opened the account solely with the firm of Craig & Co., and the members of that firm, from whom alone they took security ; and it appeared by the evidence that, notwithstanding the form of the resolutions, the arrangement contemplated thereby was treated by the parties as still open and as a matter of negotiation to be completed by some future agreement between the parties, and to perfect which meetings were from time to time held ; and afterwards, at a subsequent meeting of some of the members of the firm of Craig & Co., and Thompson & Co., on April 20th, 1881, a formal agreement was drawn up, purporting to be made between the individuals composing the firm of Thompson & Co. of the first part, and the individuals composing the firm of Craig and & Co. of the second part, which provided for the two firms carrying on their business of cattle exporters in co-operation with each other, and for dividing between the two firms the net profits and losses of the two firms respectively, from December 8th, 1880, and containing a declaration that neither company should be liable for any debts or liabilities of the other company, and that nothing therein contained should create a partnership between the two companies.

This agreement was signed by all the parties except two of the members of Thompson & Co., who refused to sign it. The two firms continued to carry on business as cattle exporters, each on its own account.

A paper purporting to be a copy of the agreement was furnished to the plaintiffs by Craig & Co., whereby it appeared to be signed by all the parties to it. But the plaintiffs

were subsequently informed of the refusal of the two to sign it, and thereafter made further advances to the firm of Craig & Co.

Held, that the refusal of two of the members of the firm of Thompson & Co. to sign the agreement of April 20th, 1881, rendered it in-operative, not only as to those refusing to sign it, but also as to those who had signed it, and that until all had signed it was not a completed agreement.

Held, also that those who actually signed the agreement could not thereby bind their co-partners who did not sign it.

Held, also, that even if the agreement had been completed it did not constitute a partnership between the two firms, so as to enable one firm to pledge the other firm's credit, for advances in carrying on the trade.

Held, also, that the provision for sharing profits and losses, which in an ordinary trading association where there is a community of capital and stock-in-trade, and a common undertaking, is conclusive evidence of a partnership, is nevertheless not a conclusive test of partnership where there is an extraordinary adventure between two partnerships presenting a well defined and well known separation of interests and ownerships.

Held, also, that the way in which the profit is to be participated in, is the essence of the matter, and that when the right to call for a proportion of the profits arises by virtue of an express contract to that effect, which would not otherwise flow from the relations of the parties, the right exists *qua* debt, and not by virtue of a partnership.

Held, also, that even assuming that the agreement of April 20th,

constituted a partnership between the two firms, yet that the plaintiffs, with knowledge of all the facts, by electing to give credit to Craig & Co. alone, were precluded from thereafter resorting to Thompson & Co.

Where one M. was induced to become a member of a firm, on the faith of representations made to him that the previous losses of the firm only amounted to \$18,000, but it subsequently turned out that such losses amounted to about \$22,000 or \$24,000.

Held, that M. by reason of such misrepresentation was entitled to be relieved from such agreement, and to be indemnified by the other members of the firm against all liabilities incurred by him as such partner, prior to the discovery of the untruth of the representations made as to the losses of the firm.

Held, also, that M. having become a partner also on the faith that the firm in question intended to form a syndicate arrangement with another firm, which arrangement failed to be carried out for want of the concurrence of some of the members of such other firm, he was on that account also entitled to be relieved from his agreement to become a partner. *The Merchants Bank v. Thompson*, 541. *Mallon v. Craig*, 541.

2. *Partner of solicitor not liable to summary jurisdiction unless guilty of personal misconduct.*—See ATTORNEYS AND SOLICITORS, 1.

3. *Action for account.*—See LIMITATIONS, STATUTE OF, 2.

See LIQUOR LICENSES—TAVERNS AND SHOPS.

PLEADING.

1. *Demurrer—Creditor's action—Non-averment of surt "on behalf of all creditors"—Solicitor's action for costs—Pleading—R. S. O. ch. 140, sec. 32—O. J. A., Rules 103, 104.*

—In an action to set aside a conveyance of land as a fraudulent preference, the non-averment that the plaintiff sues on behalf of all other creditors is not ground for demurrer, but a mere informality, to be dealt with under O. J. A., Rules 103, 104.

In an action by a solicitor to recover the amount of a bill of costs, the fact that he does not, in his statement of claim, allege that the bill was delivered a month before action brought, is not now, any more than before the Judicature Act, ground for demurrer, but only for defence.

Though under R. S. O. ch. 140, sec. 32, the right of action on a bill of costs may be suspended pending a month from delivery, nevertheless the solicitor is a creditor, and may as such, before the expiration of such month, bring an action to set aside a voluntary conveyance as fraudulent and void. *Scanz et al. v. Duckett et al.*, 370.

2. *Demurrer—General allegation of fulfilment of statutory requirements—Defence of possession in action for recovery of land—Statute of Limitations—Crown as trustee—Partial demurrer—Uncertainty or ambiguity in pleading—Practice—R. S. O. c. 165—Rules 144, 189.*

—In an action by the Attorney-General, upon the relation of the Bursar of Toronto University, to recover possession of certain lands claimed to be vested in Her Majesty for the benefit of the University, the defendants pleaded that the said land had been, with the assent of

the University and bursar, taken possession of by them for the purpose of their railway under their statutory powers, and that they had since retained and then were in possession thereof, and they also pleaded the Statute of Limitations.

Held, on demurrer, that it was necessary to set out specifically the statutes alluded to, in the various proceedings connected with the expropriation of the land, and the defence was not objectionable, upon demurrer, on the ground of want of certainty, by reason of its merely general allegation of compliance with the statutory requirements.

Held, also, that the mere allegation that the defendants were in possession afforded a good defence in law in such an action, and put the plaintiff to the proof of his cause of action, under Rule 144.

Held, also, that even if under R. S. O. ch. 165. the assent of the Lieutenant-Governor in Council to the expropriation of the lands by the railway was necessary, which it was not, yet after a user of the land by the railway for ten years, coupled with legislative recognition of the status of the railway company, and with the fact that the taking of it was with the assent of the University, and colleges, and bursar, the formal assent of the Crown must be held to have been dispensed with, and trespass or ejectment would not lie.

Held, also, that the Statute of Limitations was no bar to the action, although brought by the Crown in its capacity as trustee of the land in question.

Regina v. Williams, 19 U. C. R. 397, followed.

In the case of a partial demurrer to a pleading under Rule 189, if any

one or more paragraphs be demurred to, the Court will look at any other paragraph or paragraphs bearing on the same matter of defence, and if the whole taken together disclose a sufficient defence, the demurrer must be overruled.

When a pleading is ambiguous or uncertain, the proper remedy is to apply in Chambers to strike out or amend the defective matter, and a demurrer on that ground will not lie.

Held, in this case, that the demurrer being partly successful, and partly unsuccessful, neither party should get costs. *Attorney-General v. The Midland R. W. Co.*, 511.

3. *Want of stamps on note since O.J.A.*—See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2.

POWER.

Of executor to sell.—See **WILL**, 1.

PRACTICE.

1. *In striking off the Roll.*—See **ATTORNEYS AND SOLICITORS**, 1.

2. *Order for issue of ca sa.*—See **ARREST**.

3. *Judgment against married women.*—See **HUSBAND AND WIFE**, 2.

4. *To compel issue of debentures, action must be brought.*—See **MANDAMUS**.

PRESSURE.

See **BANKRUPTCY AND INSOLVENCY**, 2, 3.

PRESUMPTION.

Of validity of appointment of Deputy Judge.—See **COUNTY COURTS**.

PRINCIPAL AND AGENT.

Bank—Principal and agent—Ratification—Guarantee—Absence of corporate seal—R. S. O. ch. 121—D., on the suggestion of R. and the Bank of O. that he should purchase certain lumber held by the bank as security for advances made to R. required a guarantee from the bank that the lumber should be satisfactorily culled, and any deficiency paid for by the bank. The directors of the bank thereupon resolved to submit the lumber to a culler, and if he reported satisfactorily, to give the guarantee. Their local agent, however, with the approbation of their head manager, without previously employing a culler to report, gave a guarantee in writing, but not under seal, "on behalf of the bank," that the lumber should be satisfactorily culled, previously to shipment.

Held, that the bank was liable on the guarantee for any deficiency resulting from unsatisfactory culling, for the plaintiffs were warranted in assuming that the agent giving it had the necessary authority, and no seal was required; and if the bank wished to repudiate it, they should repay the money paid to them by D. for the lumber.

Held, also, that the above guarantee did not come within the description of a guarantee for the act of a third party, for the bank were selling, under R. S. O. ch. 121, by virtue of being holders of a warehouse receipt for the lumber. *Dobell et al. v. The Ontario Bank et al.*, 299.

PRINCIPAL AND SURETY.

1. *Principal and surety—Division of Court Clerk—Special agreement for fees—Discharge of sureties—Entries*

in books—Evidence.—After the defendants had become sureties for a Division Court Clerk, a special arrangement was made between the plaintiffs and the clerk, under which the latter was to receive no costs but disbursements only, in all suits entered with him by the plaintiffs in which nothing was realized, and he on his part guaranteed that the Court had jurisdiction. This was subsequently varied by giving to the clerk fifty cents in addition to the disbursements in such suits. Periodical statements were made from time to time according to the agreement, and a check given for the balance thus shewn. It was afterwards discovered that the statements were incorrect, and that moneys collected by the clerk had not been paid over.

Held, that the special arrangement made with the clerk discharged the sureties.

Held, also, that the periodical statements were not conclusive as against the plaintiffs.

The cases deciding that entries in the books of an officer are evidence in his lifetime against sureties questioned. *Victoria Mutual Fire Ins. Co. v. Davidson, et al.*, 378.

2. *Bond for secretary-treasurer of school board.*—See PUBLIC SCHOOLS, 1.

PRIORITY.

Of mechanics' lien over mortgage.—See LIEN, 2.

PROBATE AND ADMINISTRATION.

Right of creditor to.—See EXECUTORS AND ADMINISTRATORS, 1.

PUBLICATION.

For public benefit.—See DEFAMATION.

PUBLIC SCHOOLS.

1. *Municipal corporation—Public School Board—Principal and surety—Liability of a surety for Secretary-Treasurer—Construction of deeds—Mistake.*—A municipal corporation passed a by-law for raising a loan to liquidate a debt to be incurred in enlarging the school-house in a Public School section, and providing for the issue of debentures for that purpose, and for levying a special rate to pay the interest thereon, and to create a sinking fund for payment of the principal; and the municipal authorities paid the moneys so raised by the said special rate to the Secretary Treasurer of the School Board of the said section.

A., the Secretary-Treasurer of the School Board, and B., as his surety, gave a bond of office, reciting that A. had been appointed such Secretary-Treasurer, and that "it was required that security should be given for the due and faithful performance of any and all the duties pertaining to such office," and conditioned to "correctly and safely keep any and all moneys and papers belonging to the said School Board, and to faithfully and honestly deliver up, account for, and pay over any moneys which at any time thereafter might come into his hands and possession as such Secretary-Treasurer," and A. received and made default in respect of certain moneys improperly paid to him as such Secretary-Treasurer.

Held, that the condition must be read with reference to the recital, and its scope might be thereby restricted,

and reading the two together B. was not liable for the moneys so received by A., which were outside the duties pertaining to his office, and should have been retained by the municipal corporation.

B. having been informed by the School Board that A. was in default, but not in respect of what moneys the default was made, as to which he made no inquiries, and having at the request of the School Board given a mortgage to secure the liability which he was informed he had, by reason of such default, incurred as surety under the above bond, and having subsequently ascertained that the default was partly in respect of moneys so improperly paid to A.: *Held*, that B. was entitled to redeem on payment of the balance only of the moneys for which he was held liable as surety, the mortgage having been executed under a mistake. *Keith v. Fenelon Falls Union School Section et al.*, 194.

2. *High school district—By-Laws annexing parts of two municipalities—Repeal.*—In 1879 the township of Grimsby passed a by-law attaching a certain portion of the township to the village of Grimsby for high school purposes. In 1881 the same council similarly annexed another portion. Corresponding by-laws were passed by the village of Grimsby. By 45 Vic., ch. 33, O., the township was divided into two townships North and South Grimsby. In 1882 the council of the township passed a by-law, on the petition of less than two-thirds of the ratepayers, repealing the two former by-laws.

Held, that the two township by-laws, with the corresponding village by-laws, formed an agreement, pursuant to R. S. O., ch. 205, sec. 30, as amended by 42 Vic., ch. 34, sec. 32, which could not be rescinded by

one of the municipalities without the concurrence of the other; and therefore that the repealing by-law should be passed only upon the petition of two-thirds of the ratepayers. *Re Wolverton and the Townships of South and North Grimsby*, 293.

RAILWAYS AND RAILWAY COMPANIES.

1. *Railways—Carriage of goods—Right to warehouse.*—The plaintiff, who lived at Meaford, sold a quantity of barley by sample to one D, a brewer in Toronto, and shipped same by the defendants' railway, consigned to D at Brock street, signing a consignment note and receiving a shipping receipt from the company, which stipulated such receipt should not be transferable, but that as to grain consigned to defendants' elevator at at Toronto defendants would grant a negotiable receipt, and was subject to certain conditions, set out below. The barley was duly carried to Toronto and warehoused by defendants in their elevator there, under, as they contended, the right conferred therefor by the conditions; and they then tendered grain of the same grade as plaintiff's, which D refused to accept.

Held, that the consignment note and shipping receipt, which constituted the contract between the parties, shewed that a distinction was made between grain consigned to the defendant's elevator and other grain; the conditions as to warehousing, set out in the case being only applicable to the former, and that the plaintiff was therefore entitled to recover the damages sustained by the non-delivery of the specific grain shipped. *Leader v. The Northern R.W. Co. et al.*, 92.

2. *Compensation—Gift of land—Statute of Limitations.*]—S., being the owner of lands through which the defendants desired to build their road, agreed to give them the right of way, and the company, with his written permission, took possession without compensation and constructed their road, and had up to this time been in uninterrupted possession for more than ten years. The plaintiff, claiming under S. now demanded compensation and obtained a mandamus *nisi* to proceed to arbitration under the Railway Act, 1868.

Held, affirming the judgment of GALT, J., that the plaintiff was not entitled: that S. having the right to accept any or no compensation, and having elected to take none, the company then became entitled to the lands, and the plaintiff could not succeed.

Per GALT, J. The ten years possession of the company had extinguished the title of S. and those claiming under him, and vested it in the company. *Thompson v. The Canada Central R. W. Co.*, 136.

3. *Track crossing on company's premises—Statutory duty—C. S. C. ch. 66, secs. 104, 144-5.*]—*Held*, that a mere track crossing, on a road or way on a railway company's own grounds for the convenience of passengers and others in going to and from the station on railway business, is not a public crossing, highway, or place, within sec. 104 of C.S.C. ch. 66, so as to subject the company to the requirements of that section of ringing the bell or sounding the whistle when approaching such crossing; but *semble*, apart from the statute, care must be taken when starting their engines from the station.

Semble, also, that sec. 145, requiring a person to be stationed on the last car in the train, applies to the station grounds of railway companies in cities, towns, and villages, as well as to the limits outside of such station grounds. *Bennett v. The Grand Trunk R. W. Co.*, 446.

4. *Railway on highway—Leave of municipality—Acquiescence by corporation—Exercise of municipal powers without by-law—31 Vic. ch. 68, D. sec. 10.—R. S. O. 174, sec. 277.*]—Where a railway company constructed their railway along a highway in a municipality, the council whereof were not formally applied to for leave, but subsequently passed a resolution notifying the railway company to fill up the ditch existing on both sides of the railway, and to put down proper crossings:

Held, that the corporation had thereby admitted that the railway company were lawfully in occupation of the highway. and could not afterwards object,

The leave of the municipal or local authorities required by 31 Vic. ch. 68, D., before a railway is carried along an existing highway, may be granted at any time whether before, during, or after the construction of the railway, and need not necessarily be given by by-law.

Semble, that R. S. O. ch. 174, sec. 277, enacting that the powers of township councils shall be exercised by by-law—must be construed as referring only to the exercise of powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes or by another Legislature.

Held, also, that the corporation having stood by while the railway was constructed, and subsequently

for upwards of five years, while it was in operation, and having also by the resolution aforesaid, procured further expenditure by the company, were bound by acquiescence, and could not now maintain an action for the removal of the railway from the street. A corporation may be bound by acquiescence as an individual may.

Quære, whether such acquiescence would have availed as a legal justification for the defendants on an indictment for a nuisance, at the suit of the Crown. *The Corporation of the Township of Pembroke v. The Canada Central R. W. Co.*, 503.

5. *Train moving backwards—Negligence.*—The defendants were required by law to station a man on the last car of every train moving reversely in any town, to warn persons standing on or crossing the track of the approach of the train.

Held, that the defendants did not comply with this direction by having a man at the front end of the last car, where he could not see persons crossing the track.

In this case there was no brake at the rear end of the last car. The brakeman on the last car, seeing the track clear a few minutes before the accident, went to the front end, and the plaintiff then attempting to cross, was injured.

Held, evidence of negligence to go to the jury. *Levoy v. Midland R. W. Co.*, 623.

See PLEADING.

REGISTRAR.

1. *Recovery of excess of fees from.*—See REGISTRY LAWS, 1.

2. *Registry of improper instrument.*—See REGISTRY LAWS, 2.

REGISTRY LAWS.

1. *Registrar—Dismissal during year—Return to municipality—Liability for excess of fees.*—The defendant was registrar of the county of Bruce, and during the year 1882 was discharged from office. The plaintiffs brought this action for the recovery of the proportion of the amount of fees received by him up to the time of his dismissal in excess of the amount allowed to be retained by him pursuant to R. S. O. ch. 111, sec. 104.

Held, affirming the judgment of GALT, J., that the dismissal of the defendant during the year did not deprive the plaintiffs of their right to recover the excess, which right did not depend upon the return to be made in each year. *The Corporation of the County of Bruce v. Mc-Lay*, 23.

2. *Registry of instrument not authorized by Registry Act—Cloud on title—Damages—Parties—Notice of action.*—S., believing that his father (still living, but of unsound mind) was entitled to certain lands to which the plaintiffs claimed title, took the advice of his solicitor, C., who being advised by counsel, instructed by S., prepared and registered an instrument, whereby he, S., stated that he claimed the lands, and would upon the demise of his father commence proceedings for their recovery. The plaintiffs were thus obstructed in the sale of their lands, and brought an action against S., C., and the registrar, to remove the instrument from the register, as being a cloud on the title, and for damages. PROUDFOOT, J., dismissed the action as against the registrar, but gave judgment, with a reference to assess damages against S. and C.

Held, that the Registry Act did not authorize the registration of such an instrument ; and, CAMERON, J., dissenting, that an action would lie for its removal.

Per CAMERON, J.—The instrument, being on its face one which did not affect the title, was not removable by the Court, and the action should be dismissed.

Per HAGARTY, C. J., and ARMOUR, J.—The act of registration was a wrongful one, and all parties concerned in it were responsible to the plaintiffs, and the registrar was, therefore, a proper party ; but, *per* HAGARTY, C. J., he was not a necessary party.

Per HAGARTY, C. J.—There being no *mala fides*, the damages should be nominal.

Per CAMERON, J.—The registrar was not a proper party, having acted in good faith, and in the belief that he was acting within the scope of his duty ; nor was C., the solicitor, a proper party, he having acted to the best of his judgment and ability in advising his client, after consulting counsel. *Ontario Industrial Loan and Investment Co. v. Lindsey et al.* 66.

3. *Statute of Limitations—Acknowledgment of title—Retrospectivity of Registry Acts—Mortgages—Right to consolidate—R. S. O. ch. 180, sec. 19,—R. S. O. ch. 111, sec. 81.*—Where a mortgagee in possession wrote, in 1871, to the holder of the equity of redemption as follows : “ The amount due me in November, 1853, on your mortgages was as follows,” (stating the amounts.) “ No part of that sum has since been paid to me, but the rents I have received have nearly kept down the interest.”

Held, a sufficient acknowledgement of title to give a new starting point

to the Statute of Limitations from the date of the letter.

Where two mortgages on different properties by the same mortgagor came into C.'s hand before the Registry Act of 1865, and the mortgagor, after the passing of the said Act, assigned the equity of redemption to, M by a registered instrument : *Held* on M.'s suing for redemption, that the registered conveyance to M. prevailed under sec. 66 of the said Act, over C.'s equitable right to consolidate the two mortgages.

The Registry Act of 1865, sec. 66, and the Registry Act of 1868, sec. 68, are retrospective. *Miller v. Brown*, 210.

RENT.

Tenement—Statute of Frauds—25 Geo. II ch. 6, sec. 1.—Rent issuing out of land in a tenement ; it partakes of the nature of land, and is within the 5th section of the Statute of Frauds, and hence is also within 25 Geo. II. ch. 6, sec. 1. *Hopkins v. Hopkins*, 223.

REPRESENTATION.

See EVIDENCE, 1.

RES JUDICATA.

See BANKS.

SALE OF GOODS.

1. *By bank.*—*See* BANKS.

2. *By Pressure—Not “voluntary.”*—*See* BANKRUPTCY AND INSOLVENCY, 1.

SALE OF LANDS.

See SPECIFIC PERFORMANCE, 3.

SEPARATE ESTATE.

Judgment against.]—See HUSBAND AND WIFE, 2.

SERVICE OF PAPERS.

See DIVISION COURT.

SIDEWALK.

See WAYS.

SHERIFF.

See MORTGAGE, 2.

SOLICITORS.

Right to sue for bill of costs.]—See PLEADING, 1—ATTORNEY AND SOLICITORS.

SPECIFIC PERFORMANCE.

1. *Specific performance—Costs—Jurisdiction—Costs to be paid by successful defendant.*] — Whatever may be the rule in England, this Court has maintained jurisdiction to make a defendant pay costs in a suit for specific performance, though the bill be dismissed, if the circumstances be such as to warrant doing this.

Hence, in such a suit, brought by the purchasers of certain lands, against the vendors and a subsequent purchaser. Where the Judge of first instance dismissed the action without costs, but gave the subsequent purchaser his costs against his

co-defendants, although no issue was raised between the defendants.

Held, that, he had jurisdiction to make the order, in his discretion, and having exercised such discretion, this Court would not interfere.

McMahon v. Barnes, Order Book No. 9, fol. 730, (not reported,) followed. *Church v Fuller et al.*, 417.

2. *Agreement between father and son—Specific performance.*] — The defendant in 1871 wrote to his son, who had left home to work for himself, that if he would return he would give him 50 acres of his farm and a share of the cattle and sheep when the plaintiff got married, but if he stayed away he would sacrifice his own and his father's interests. Upon receipt of the letter the plaintiff returned and remained on the farm working it with his father, except at certain times when he went away to work for wages for himself. It was proved that the father had pointed out the 50 acres which he intended to give his son, and the son entered and erected a house thereon with his father's approval, and occupied it with his family, he having married in 1879.

Held, that the plaintiff was entitled to specific performance of this agreement— *Garson v. Garson*, 439.

3. *Statute of Frauds—Sale of lands.*] — When A., whose wife owned a certain freehold property on St. George's Street, wrote to B, the owner of a certain leasehold property on King Street, with reference to the said properties, as follows, "If you will assume my mortgage, and pay me in cash, \$3,700, I will assume your mortgage of \$5,000 on the leasehold," and B. replied, "Your offer of this date, for the exchange

of my property on King Street for your property on St. George Street, I will accept on your terms."

Held, affirming the judgment of FERGUSON, J., 2 Ont. R. 609, not a sufficient memorandum of the contract to satisfy the Statute of Frauds, ARMOUR, J., doubting.

Held, also, in an action for specific performance of the above contract by B., correspondence between the solicitors of the parties of date subsequent to the date of the above letters, as also the requisitions respecting title which passed between the solicitors, were inadmissible in evidence,

Held, further, the fact that A's wife had signed a conveyance of the land in question to B., which conveyance had never been delivered, and did not, by recital or otherwise, set forth the contract relied on, could not assist B. in the action for specific performance. *McClung v. McCracken et ux.*, 586.

STAMPS.

Want of, since repeal of Stamp Act.]—See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 2.

STATUTES, CONSTRUCTION OF.

2 *Jac.* 1, *ch.* 16, *Imp.* (*Statute of Limitations*).]—See **LIMITATIONS, STATUTE OF**, 2.

25 *Geo.* II., *ch.* 6, *sec.* 1, *Imp.*]—See **RENT—WILL**, 3.

31 *Vic.*, *ch.* 68, *D.* (*The Railway Act, 1868*).]—See **RAILWAYS AND RAILWAY COMPANIES**, 2, 4.

32 and 33 *Vic.*, *ch.* 22, *sec.* 45, *D.*]—See **CRIMINAL LAW**, 2.

34 *Vic.* *ch.* 5, *D.*]—See **BANKS**.

R.S.O. ch. 42.]—See **COUNTY COURTS**.

R.S.O. ch. 46, *secs.* 32, 36.]—See **EXECUTORS AND ADMINISTRATORS**, 1.

R.S.O. ch. 47, *sec.* 231.]—See **DIVISION COURTS**, 1.

R.S.O. ch. 66, *secs.* 27, 28.]—See **MORTGAGE**, 2.

C.S.C. ch. 66, *sec.* 104, 144.]—See **RAILWAYS AND RAILWAY COMPANIES**, 3.

R.S.O. ch. 85.]—See **COUNTY ATTORNEY**.

R.S.O. ch. 108, *secs.* 5, 10, 11, 12, 43.]—See **WILL**, 3.

R.S.O. ch. 108, *sec.* 19.]—See **REGISTRY LAWS**, 3.

R.S.O. ch. 108, *sec.* 23.]—See **LIMITATIONS, STATUTE OF**, 1.

R.S.O. ch. 111.]—See **MORTGAGE**, 3.

R.S.O. ch. 111, *secs.* 81, 104.]—See **REGISTRY LAWS**, 3, 1.

R.S.O. ch. 118.]—See **BANKRUPTCY AND INSOLVENCY**, 1, 2, 3.

R.S.O. ch. 120, *sec.* 4, 7.]—See **LIEN**, 1, 2.

R.S.O. ch. 121.]—See **PRINCIPAL AND AGENT**.

R.S.O. ch. 140, *sec.* 32.]—See **PLEADING**, 1.

R.S.O. ch. 162.]—See **INSURANCE**, 2.

R.S.O. ch. 165.]—See **PLEADING**, 2.

R.S.O. ch. 174.]—See **WATER AND WATERCOURSES**, 1.

R.S.O. ch. 174, *sec.* 277.]—See **RAILWAYS AND RAILWAY COMPANIES**, 4.

R.S.O. ch. 174, *sec.* 466.]—See **MUNICIPAL CORPORATIONS**, 1.

R.S.O. ch. 175, *sec.* 529.]—See **WATER AND WATERCOURSES**, 2.

R.S.O. ch. 181, *sec.* 28.]—See **TAVERNS AND SHOPS**.

R.S.O. ch. 199.]—See **WATER AND WATERCOURSES**, 1.

R.S.O. ch. 205, *sec.* 30.]—See **PUBLIC SCHOOLS**, 2.

40 *Vic. ch. 32 D.*]—See CRIMINAL LAW, 1.

41 *Vic ch. 16 D. (Canada Temperance Act, 1878).*]—See CONVICTION.

42 *Vic. ch. 34, sec. 32, O.*]—See PUBLIC SCHOOLS, 2.

44 *Vic. ch. 34, sec. 12 O.*]—See MUNICIPAL CORPORATIONS, 1.

45 *Vic. ch. 1, D.*]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 2.

45 *Vic. ch. 33, O.*]—See PUBLIC SCHOOLS, 2.

STEAM MOTER.

See AGREEMENT.

SYNDICATE.

See PARTNERSHIP.

TAVERNS AND SHOPS.

Municipal Act—Liquor license—Disqualification as councillor—Partnership.]—The defendant and his brother were carrying on business as Booth Bros., and had a license in the name of the firm to sell intoxicating liquors. Before the nomination of members of the Parkdale council the defendant, with the consent of the license commissioners, transferred his interest in the license to his brother, in order to qualify as a councillor, but the business continued as before.

Held, affirming the decision of the Master in Chambers, that a license cannot lawfully be transferred except in the cases mentioned in R. S. O. ch. 181, sec. 28, none of which had occurred here: that the consent of the commissioners did not validate the transfer, and therefore that the defendant, who retained his interest

in the license, was not qualified to be a councillor.

Per ARMOUR, J. The Act disqualifying a licensee should be construed strictly, and should not be extended to the partner of a person lawfully holding a license in his own name. *Regina ex rel. Brine v. Booth*, 144.

TEMPERANCE, CANADA ACT.

See CONVICTION.

TITLE.

1. *Cloud on.*]—See MORTGAGE, 3—REGISTRY LAWS, 2.

2. *Covenant for.*]—See FRAUD AND MISREPRESENTATION.

TRACTION ENGINE.

See AGREEMENT.

TRUSTEES.

Crown bringing action as.]—See PLEADING.

VENDOR AND PURCHASER.

Purchaser from executor.]—See WILL.

VOLUNTARY CONVEYANCE.

Under pressure.]—See BANKRUPTCY AND INSOLVENCY.

WAIVER.

1. *Chattel mortgage—Execution seizure.* — Where a sheriff seizes goods under a writ of execution, and a mortgagee lays claim to them under a chattel mortgage, the fact that he subsequently directs the sheriff to sell under the execution, does, not necessarily amount to a waiver of his claim under the mortgage. *Segsworth v. The Meriden Silver Plating Co.*, 413.

2. *Of service of summons.*—See CONVICTION.

3. *Of formalities.*—See DISTRESS—RAILWAYS AND RAILWAY COMPANIES, 4.

See ESTOPPEL.

WATER AND WATER-COURSES.

1. *Drainage—Overflow—Public drainage work—Municipal law—Drainage Acts—Damages—R. S. O. ch. 174—Ib., ch. 199.*—Where a municipality, acting under the Ontario Drainage Act, in pursuance of a scheme for the drainage of their township, constructed a system by which water was drained off into a certain drain formerly constructed through the plaintiff's land and running into a natural creek, whereby the creek, by reason of the accumulation of water caused by the new drains, though sufficient before to carry off the water brought down into it, overflowed and injured the plaintiff's land.

Held, that the defendants were liable for any damage thus caused to the plaintiff, and there was nothing in the municipal or other legislation

of this Province to change the illegal character of such an Act.

It appeared, however, that the plaintiff's property had been benefited by the drainage works as a whole to a greater extent than it had been injured by the overflow complained of, and the defendants acceded to the reasonableness of the plaintiff's demand for a better outlet, and were proceeding to make it.

Held, that under these circumstances it was sufficient for the present to declare the plaintiff entitled to have the creek widened and deepened to the necessary extent within a reasonable time. *Northwood v. The Corporation of the Township of Raleigh*, 347.

2. *Municipal corporation—Drainage by-law—Misappropriation of moneys assessed—Breach of trust—Mandatory order—Injunction—Parties—Attorney-General—Arbitration—R. S. O. ch. 175, sec. 529.*—

Where, on the petition of the plaintiff and other ratepayers, a township corporation had passed a by-law for the construction of the B. drain, and the assessment of the lands to be benefited thereby, part of which the plaintiff owned, but the drain had not been completed, though a reasonable time had elapsed, and a portion of the moneys assessed had been applied upon a certain other drain, not mentioned in the petition, the report of the public land surveyor made pursuant to R. S. O. ch. 529, or in the said by-law, and of no value to the said petitioners.

Held, that the plaintiff was entitled to an order compelling the corporation to complete the B. drain according to the by-law, to an injunction to restrain further misapplication of the moneys assessed, and to an account thereof, for that the by-

law created a trust which had been violated.

Held, also, that the plaintiff was entitled to maintain the action without the Attorney-General.

Held, also, that the fact that the moneys so assessed, were so diverted pursuant to a resolution of the council, passed in accordance with a promise made to certain of the petitioners for the B drain, who signed such petition and submitted to assessment, on the faith of such promise was no justification of such diversion.

Held, lastly, that this was not a case for arbitration, or, at all events, not a case in which the plaintiff was bound to proceed in that manner. *Smith v. The Corporation of the Township of Raleigh*, 405.

3. *Discharging water from building upon street—Formation of ice thereon—Negligence—Liability of proprietor.*)—The defendants were the owners of a building on the street. A pipe connected with the eave troughs, conducted the water from the roof down the side of the building, and by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking on the street, and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known it.

Held, ARMOUR, J., dissenting, that the defendants were not liable.

Per HAGARTY, C. J. The carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident, and the defendants not having knowingly allowed ice to accumulate were not responsible.

Per ARMOUR, J. The conducting of the water to the sidewalk was a wrongful act, of which the formation of ice on the sidewalk in winter was the natural certain and well known result, and defendants were responsible for the accident. *Skelton et ux. v. Thompson et al.*, 11.

WIDOW.

Right to companion in quarantine.]—See DOWER, 1.

WILL.

1. *Will—Charge on Land—Purchase from executor—Unlimited trust.*]

—A testator, after directing that his funeral charges and debts should be paid by his executor, disposed of his real and personal estate as follows: First, he gave and bequeathed certain legacies “to be paid out of my estate,” and then he gave the residue and remainder of his estate, real and personal, to his son W. absolutely, and he nominated W. sole executor.

Held, that the legacies were, by the will, charged upon the estate, real and personal, and failing personal estate became a charge on the land; and that W. had power to sell the land, and a purchaser from him was not bound to see to the application of the purchase money. *Moore v. Mellish*, 174.

2. *Will—Charitable bequests—Uncertainty.*]

—A testator, a minister of the United Presbyterian Church of North America, after bequeathing \$1,000 to the said Church, proceeded as follows: “I give for a Jewish Mission \$1,000 to that church which

is sound and evangelical in doctrine and pure in worship, using the songs of praise, the inspired book which can unite all nations," &c.

The evidence showed that this description applied to the said church :

Held, not void for uncertainty, for that the testator clearly intended the said Church as the legatee.

The testator then proceeded thus : "To the pious poor converted Jews that meet together for the reading of the scriptures for their instruction and mental edification I leave \$1,000 :"

Held, a good charitable bequest and not void for uncertainty.

Lastly, the testator gave "the balance" of his estate "to the poor and destitute, to supply their wants in food and raiment :"

Held, a valid bequest so far as the residue consisted of personalty, and an inquiry directed to guide the Court in the application of the fund. *Gillies et al. v. McConochie*, 203.

3. *Devise of rent to attesting witness—Statute of Limitations—Possession—25 Geo. II. ch. 6, sec. 1—R. S. O. ch. 108, sec. 5, sub-sec. 5—Ib., secs. 10, 11, 12, and 43.*—A testator devised land, subject to a lease, to J. H. in fee, and as to the rent directed half to be paid to J. H., and half to the executor in trust for J. H. The executor, assuming the devise to be valid, paid all the rent to J. H. The latter executed a deed of the land to C. H., to whom he afterwards paid the rent with the privity of the executor, as soon as he received it from him. C. H. went into possession of the land after the expiration of the lease, and had been so receiving rent or in possession for more than ten years before action commenced. J. H. was a witness to the will.

Held, (affirming the decision of PROUDFOOT, J.) that the devise of rent was void under 25 Geo. II. ch. 6, sec. 1, as J. H. was the beneficial devisee of the whole of it.

Held, further, (also affirming PROUDFOOT, J.) that the perception of the rent by the executor was from the outset "wrongful" within R. S. O. ch. 108, sec. 5, sub-sec. 5, and C. H. had acquired a good title by possession. *Hopkins v. Hopkins et al.* 223.

WORDS, CONSTRUCTION OF.

Traction engine.] — See AGREEMENT.

WORK AND LABOUR.

Contract—Construction—Condition precedent—Obtaining estimate of engineer.]—O. D. & Co. contracted with the Government to complete certain telegraph works, and M. afterwards contracted with O. D. & Co. to construct part of the said works, in which latter contract O. D. & Co. covenanted to pay M. at the rate mentioned therein per mile, but the contract was expressed to be subject to the condition that the said payments should be made to M. within twenty days after the estimate of the engineer in charge, to be by him put in from time to time to the Minister of Public Works, and service of a copy of such estimate on O. D. & Co.

Held, that this alone, apart from other portions of the contract, was sufficient to make such estimate and service of a copy thereof, a condition precedent to M.'s right to recover for work done under his contract.

Furthermore, by a third contract T. M. and G. M. contracted with both M. and O. D. & Co. to make

advances to M., and to become security for M.'s due completion of the work, it being agreed therein that "upon the completion of the contract O. D. & Co. should pay T. M. and G. M. the amount due them by M. for supplies before paying M. anything."

Held, that there must be an amount owing by O. D. & Co. to M., for which M. could recover against them, before O. D. & Co. were liable under the above contract to pay T. M. and G. M. anything, and that the intention was only to enable T. M. and G. M. to intercept payment by O. D. & Co. to M. of money due from them to M. *McDonald v. Oliver et al.*, 310.

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